88-1890

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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HOWARD L. BEYER, Superintendent, and
PETER N. PERRETTI, JR., Attorney General
of New Jersey,

*Petitioners,*

v.

JOHN MICHAEL HUMANIK, JR.,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether principles of due process as articulated in *In re Winship*, 397 U.S. 358 (1970), and *Martin v. Ohio*, 480 U.S. 228, 233-34, *reh'g denied*, 481 U.S. 1024 (1987), are violated by a jury charge which instructs that a defendant must establish the statutory defense of mental disease or defect by a preponderance of the evidence and which does not specifically preclude the jurors from considering evidence of mental disease or defect not rising to a preponderance in determining whether the State has sustained its burden of proving each element of the offense charged beyond a reasonable doubt?

2. Whether a state constitutionally may impose on a defendant the burden of establishing by a preponderance of the evidence that he suffered from a mental disease or defect the existence of which was relevant to show he was incapable of the requisite *mens rea*, where the jury was unequivocally instructed as to the presumption of innocence and the State's never-shifting burden of proof of the elements of the offense charged?

3. Whether a federal court of appeals reviewing the denial of an application for habeas corpus relief is compelled to apply the harmless error doctrine before it vitiates a state murder conviction previously upheld by all other courts and based upon a record demonstrating overwhelming evidence of guilt?

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All parties below are parties to this petition.

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IN THE

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OCTOBER TERM, 1988

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**No. _____**

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HOWARD L. BEYER, Superintendent, and
PETER N. PERRETTI, JR., Attorney General of New Jersey,
*Petitioners*,

vs.

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*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioners, Howard L. Beyer, Superintendent, New Jersey State Prison, and Peter N. Perretti, Jr., Attorney General of the State of New Jersey, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on March 31, 1989.

## OPINIONS BELOW

The written opinion of the Superior Court of New Jersey, Appellate Division (Baime, J.A.D.), is reported at 199 N.J. Super. 284, 489 A.2d 691 (App. Div.), *certif. denied*, 101 N.J. 266, 501 A.2d 934 (1985), and is reprinted as Appendix F, p. 53a, *infra*.

The written opinion of the United States District Court, District of New Jersey (Brown, U.S.D.J.), has not been reported. It is reprinted as Appendix C, p. 29a, *infra*.

The written opinion of the United States Court of Appeals for the Third Circuit (Stapleton, J.), is reported at ___ F.2d ___ (3d Cir. 1989), and is reprinted as Appendix A, p. 1a, *infra*.

## JURISDICTION

On March 31, 1989, the United States Court of Appeals for the Third Circuit filed its opinion and entered its judgment reversing the district court's denial of a writ of habeas corpus. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. sec. 1254(1).

## FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, SEC. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

NEW JERSEY STATUTES ANNOTATED 2C:4-2 (West 1982)

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such

evidence it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.

NEW JERSEY STATUTES ANNOTATED 2C:11-3(a)(1) and (2)
L. 1978, c. 95 (effective Sept. 1, 1979),
amended L. 1978, c. 178 (effective Sept. 1, 1979).

Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death. . . .

NEW JERSEY STATUTES ANNOTATED 2C:2-2b
(West 1982)

(1) *Purposely.* A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) *Knowingly.* A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

## STATEMENT OF THE CASE

In this case, a federal court of appeals, in ultimately reversing the district court's denial of a state prisoner's application for a writ of habeas corpus, determined that a state statute setting forth the "affirmative defense" of mental disease or defect was constitutionally infirm. Respondent herein, John Michael Humanik, Jr., was convicted by a jury on April 1, 1982, of the murder, as proscribed in N.J. Stat. Ann. 2C:11-3, of his 15-year old ex-girlfriend, Lisa Ann Guzzo, on August 11, 1981. On June 4, 1982, the state trial court sentenced respondent to a life term, with a 25-year parole disqualifier. Respondent's conviction was affirmed on appeal and the Supreme Court of New Jersey subsequently denied certification on May 16, 1985. *State v. Humanik*, 199 N.J. Super. 283, 489 A.2d 691 (App. Div.), *certif. denied*, 101 N.J. 266, 501 A.2d 934 (1985). See Appendix F; Appendix E.

On December 30, 1987, the United States District Court, having jurisdiction over respondent's petition for a writ of habeas corpus by virtue of 28 U.S.C. sec. 1331 and 28 U.S.C. sec. 2241, denied the petition and found no probable cause to appeal. (App. C, at pp. 29a-40a). The United States Court of Appeals for the Third Circuit, vested with jurisdiction pursuant to 28 U.S.C. sec. 1291 and 28 U.S.C. sec. 2253 and having granted respondent's application for a certificate of probable cause to appeal, reversed the district court on March 31, 1989. (App. A, at p. 27a). On April 21, 1989, pursuant to Federal Rule of Appellate Procedure 41(b), the court of appeals stayed the issuance of the certified judgment in lieu of formal mandate until May 22, 1989, with the stay to continue to final disposition by this Court if this petition is filed on or before May 22, 1989. (App. B).

The undisputed facts developed at the state court trial, and set forth comprehensively in the opinion of the Superior Court of New Jersey, Appellate Division, Appendix F, at pp. 54a-57a, can be briefly stated. Respondent, five years older than Ms. Guzzo, had been romantically involved

for several years with the victim since shortly after her thirteenth birthday. On August 5, 1981, six days before the murder, the young woman told respondent she desired to terminate their relationship and date someone else. Respondent went to apply for a gun purchase permit the following day. During the ensuing days, respondent learned how to use his uncle's handgun, purchased gun ammunition and a hunting knife, and unsuccessfully attempted both to learn the identity of her new boyfriend and to convince Ms. Guzzo to change her mind. At one point respondent displayed the gun at a meeting with the young woman.

On the evening of the murder, respondent, armed with the loaded handgun and the hunting knife and carrying binoculars, surveilled Ms. Guzzo's home and after waiting approximately 40 minutes for the young woman and her boyfriend, Stanley Emanuels, to emerge, created a distraction to enable him to enter the home surreptitiously. Respondent held Ms. Guzzo, Emanuels, and Ms. Guzzo's sister, Gina, at gunpoint for several hours, until approximately 11:30 p.m., when Mr. and Mrs. Guzzo, returning home, drove up the driveway. At that time respondent pointed the gun at Ms. Guzzo and fatally shot her once in the head. Respondent fled immediately and was a fugitive until, still armed with a loaded gun, he was apprehended on October 6, 1981, in a Las Vegas casino.

In a letter written to his aunt during the months he was a fugitive, respondent related his actions and articulated his thoughts during the intervening weekend before the homicide. He thought of shooting Lisa and her new boyfriend (Transcript of March 25, 1982, at T44-22 to 24); felt hate, jealousy and desire for revenge (*id.* at T45-6 to 9); fantasized as to the "perfect" time to do it (*id.* at T45-12 to 18), and pulled out the gun at one point but was unable to shoot her. (*Id.* at T46-9 to 12). Respondent further related the shooting events. With the gun "aiming right at Lisa," with the safety off, respondent "less than five feet away" and "really mad" "squeezed the trigger." (*Id.* at T48-17 to 20). His letter included a denial that he did "it intentionally." (*Id.* at T48-20 to 21). The rest of

the letter was an extremely detailed account of his fugitive life and how by ingenuity, theft and fabrication, he travelled from the New Jersey shore area to North Carolina, Florida and finally Las Vegas.

At trial, Stanley Emanuels testified as an eyewitnesss to the murder of Ms. Guzzo by respondent. A defense psychiatrist testified that respondent suffers from a Borderline Personality Disorder and that, in his opinion, respondent did not knowingly or purposely commit the act resulting in Ms. Guzzo's death. (Transcript of March 29, 1982, at T46-22 to 47-1; *id.* at T57-11 to 58-7; *id.* at T64-7 to 15). A defense psychologist testified that respondent suffered from a "schizo-affected pychosis" (*id.* at T139-5 to 9), neurosis, and a personality disorder. (*Id.* at T145-2 to 12). He further testified that, in his opinion, respondent "did not knowingly in terms of his overwrought state of mind with intent plan to commit the homicide." (*Id.* at T166-13 to 21).

In the State's rebuttal case, a psychiatrist testified that in his opinion respondent was not suffering from any psychiatric problem that would affect "his ability to knowingly carry out his actions" (Transcript of March 31, 1982, at T8-5 to 23), respondent's antisocial personality disorder did not affect his ability to perform acts with purpose (*id.* at T13-12 to 14-14), and respondent acted out of anger and a desire to punish his victim. (*Id.* at T15-9 to 14). The opinion of a clinical psychologist was that respondent had a paranoid personality (*id.* at T113-1 to 16) which did not have any effect on his ability to act either knowingly or with purpose, as there was no "defect in thought." (*Id.* at T114-14 to 17; T115-1 to 22). Respondent did not suffer from any mental disorder that would prevent him from acting purposely. (*Id.* at T115-23 to 116-3).

Respondent's testimony was that "the gun went off." (Transcript of March 28, 1982, at T131-10). According to respondent, he did not "aim" at Ms. Guzzo or see the bullet hit her; he "wasn't even conscious of the gun in [his] hand." (*Id.* at T131-12 to 16). He further denied that

he intended to shoot Ms. Guzzo or anyone, or even fire the weapon that evening. (*Id.* at T132-21 to 25).

In its jury instructions, the trial court charged the jurors that it is "unquestioned" respondent is presumed innocent (App. G, at p. 76a); that it is the State's burden to prove respondent guilty beyond a reasonable doubt (*id.*); that "the burden of proving the [respondent's] guilt rests heavily on the State and it never shifts back to the [respondent]. Mr. Humanik has had no duty or obligation to prove that he's innocent in the sense that we say that the State must prove his guilt. . . ." (*id.*), and that if the State fails with respect to its burden of proving each element of the crimes charged, then respondent is entitled to an acquittal. (*Id.*).

The trial court explained reasonable doubt to the jurors as "an honest and reasonable uncertainty as to the guilt of the [respondent] which exists in your minds after you have fairly, completely and impartially considered all the testimony and all the evidence" (*id.* at p. 77a), and further explained that a reasonable doubt could arise from the evidence and testimony presented in the courtroom, or from an absence thereof. (*Id.*). The court further explicated that the verdict must be based solely on the evidence adduced in the courtroom (*id.*), that a guilty verdict must rest on a finding of guilt beyond a reasonable doubt (*id.*), and that if the evidence relating to respondent's guilt is capable of two constructions, that is, innocence or guilt, then acquittal is mandated. (*Id.*).

In charging as to "flight," the court instructed the jurors that they were free to consider respondent's conduct after the homicide "in connection with all the other evidence in the case in making a determination of his mental state at the moment of the homicide." (*Id.*). In instructing on "expert testimony" (see *id.* at pp. 78a-79a), the court specifically told the jury it was free to accept or reject, wholly or partially, any of the expert opinions, and that any accepted expert opinion was "but a single factor in determining whether or not the State has carried its burden of proving the charge against the [respondent] beyond a reasonable doubt." (*Id.* at pp. 78a, 79a).

The trial court instructed as to the elements of knowing or purposeful homicide (*id.* at pp. 79a-81a), and then instructed the jurors as to N.J. Stat. Ann. 2C:4-2. (*Id.* at pp. 81a-82a).

The court stated:

> In connection with the question of the [respondent's] mental state at the time in question, since the [respondent] has raised this defense, that is, the defense that he had a mental disease or defect at that time which prevented him from having the state of mind the law says he would have to have, that is, a knowing or purposeful mental state in connection with the killing, he has the burden to prove that he had such mental defect or disease by a preponderance of the evidence.
>
> * * *
>
> Therefore, if after considering all of the testimony and the evidence in this case in connection with the charge of murder you find that the [respondent] has failed to carry the burden of defense of mental disease or defect, and in addition, you find that the State has convinced you beyond a reasonable doubt that he either purposely or knowingly caused the death of Lisa Guzzo, your verdict should be guilty of murder.
>
> On the other hand, if after considering all of the evidence and testimony you determine the State has failed to prove each and every element of the crime of murder and that the [respondent] has carried his burden of proving the defense of mental disease or defect at the moment the shot was fired by a preponderance of the evidence, then you should find him not guilty of murder.

(*Id.* at pp. 82a-83a).

The trial judge thereafter instructed the jurors as to the elements of the lesser crimes of aggravated man-

slaughter, N.J. Stat. Ann. 2C:11-4b(1), and passion/provocation manslaughter, N.J. Stat. Ann. 2C:11-4b(2), and reviewed again the State's burden to prove beyond a reasonable doubt that respondent killed Ms. Guzzo purposely or knowingly, in order to sustain a guilty verdict of murder. (*Id.* at p. 82a; Transcript of April 1, 1982, at T133-5 to 137-25).

The jury deliberated a total of three hours and 12 minutes before returning its verdict convicting respondent of murder. (Transcript of April 1, 1982, at T146-25 to 147-1; T158-24 to 159-5; T161-5 to 7; T164-18 to 21; T165-23 to 25). There were no questions from the jurors during deliberations.

The Superior Court, Appellate Division, affirmed respondent's murder conviction. (App. F). Relying upon *Patterson v. New York*, 432 U.S. 197 (1977), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *State v. Molnar*, 81 N.J. 475, 410 A.2d 37 (1980), the reviewing court held that N.J. Stat. Ann. 2C:4-2 did not deprive respondent of his right to procedural and substantive due process. (App. F, at pp. 58a-67a). The court was satisfied that compelling "the defense to rebut the assumption of mental normalcy" was constitutionally permissible "as long as the prosecution bears the burden of establishing the requisite state of criminal culpability beyond a reasonable doubt." (*Id.* at p. 66a).[1] The Supreme Court of New Jersey denied certification. (App. E).

In his petition for a writ of habeas corpus, respondent alleged that the jury instruction denied him his right to due process. By opinion and order filed on December 30, 1987, the Honorable Garrett E. Brown, Jr., U.S.D.J., dismissed the petition. The district court relied upon *Martin v. Ohio*, 480 U.S. 228, *reh'g denied*, 481 U.S. 1024 (1987), *Patterson v. New York*, 432 U.S. 197, and *State v. Breakiron*, 108 N.J. 591, 532 A.2d 199 (1987), in concluding that

[1] Respondent also raised his Ex Post Facto claim in the Appellate Division and in each succeeding proceeding. The state courts rejected the contention, as did the federal district court and the court of appeals.

the jury instruction did not violate respondent's constitutional right to due process because the instruction did not shift the burden of proving the elements of the charged crime. (App. C, at pp. 30a-35a). According to the district court, "[p]roving diminished capacity does not mean that the defendant has to disprove the act was knowing or purposeful." (App. C, at p. 35a). Finally, the court recognized that any error in charging N.J. Stat. Ann. 2C:4-2 was harmless because of the clearly established proof of respondent's guilt, in light of his calculated course of conduct, the medical testimony as to respondent's capacity to act knowingly and/or purposely, the opportunity afforded the jurors to consider offenses of lesser culpability, and the clear jury instructions as to the State's obligation to prove beyond a reasonable doubt that respondent acted with knowledge and/or purpose. (*Id.* at pp. 39a-40a). The district court on December 30, 1987, accordingly dismissed the petition.

On appeal, the court of appeals reversed the district court. The court determined that the jury charge with respect to evidence of mental disease or defect violated respondent's due process rights and further, that N.J. Stat. Ann. 2C:4-2 was constitutionally infirm. (App. A, at pp. 2a, 24a, 26a). According to the court of appeals, the express instruction that respondent had the burden of establishing by a preponderance of the evidence that he had a mental disease or defect "that negated the existence of an intent to kill Ms. Guzzo" was unconstitutional. (App. A, at pp. 21a-22a). The court of appeals also concluded that pursuant to *Francis v. Franklin*, 471 U.S. 307 (1985), the murder conviction could not be upheld, where the unconstitutional nature of the charge was not "cured" by any *explanatory* instruction and accordingly, there was "more than a reasonable likelihood that the jurors in [respondent's] case received an unconstitutional understanding of their task." (App. A, at pp. 22a-24a). Finally, the court of appeals determined that even if it accepted petitioners' argument that the jury charge effectively comported with the state supreme court's interpretation of

N.J. Stat. Ann. 2C:4-2, as expressed in *State v. Breakiron*, 108 N.J. 591, 532 A.2d 199, and later in *State v. Zola*, 112 N.J. 384, 548 A.2d 1022 (1988), *cert. denied*, 109 S. Ct. 1146 (1989), it was nevertheless required to vitiate respondent's murder conviction because of a constitutional problem "inherent in the statute even as it has been construed in these two supreme court opinions."[2] (App. A, at p. 24a). The court of appeals, relying upon *Martin v. Ohio*, 480 U.S. 228, concluded that the proposed jury charge approved by the state supreme court in *State v. Zola*, 112 N.J. at 402, 548 A.2d at 1031, would effectively preclude the jurors from considering evidence of mental disease or defect that did not reach the standard of preponderance of the evidence in the same unconstitutional manner as the "hypothetical charge condemned in *Martin*." (App. A, at p. 26a). The court of appeals concluded that this "'preponderance of the evidence' filter" was constitutionally impermissible. *Id.*

The court of appeals reversed the district court and remanded with instructions to enter a judgment "requiring the State of New Jersey to release [respondent] unless he is retried and convicted within a reasonable period." (*Id.* at p. 27a). On application of petitioners, the court of appeals stayed the entry of the certified judgment in lieu of mandate pending the filing and disposition of the within petition for *certiorari*. (App. B).

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[2] In *State v. Breakiron*, the Supreme Court of New Jersey held that N.J. Stat. Ann. 2C:4-2 is not an "affirmative defense" that will excuse or justify otherwise criminal conduct but is one which permits the adduction of evidence of mental disease or defect relevant to whether the State has established the requisite *mens rea* beyond a reasonable doubt. *State v. Breakiron*, 108 N.J. at 620, 532 A.2d at 214. The state supreme court concluded, accordingly, that so long as the State always has the never-shifting burden of proving the essential elements of the charged crime beyond a reasonable doubt, it was constitutional to require a defendant to establish the presence of such mental disease or defect. *Id.* In *State v. Zola*, 112 N.J. 384, 548 A.2d 1022, the state supreme court found that the jury charge on mental disease or defect did not effectuate an irrebuttable presumption of a culpable mental state and did not impermissibly shift the State's burden. *Id.* at 400-402, 548 A.2d at 1029-31.

## REASONS FOR GRANTING THE WRIT

### A. The Court Of Appeals Erroneously Interpreted N.J. Stat. Ann. 2C:4-2 To Impose A "Preponderance Of The Evidence" Filter That Would Allegedly Preclude The Jurors From Considering Evidence Of Mental Disease Or Defect In Determining Whether There Is A Reasonable Doubt Respondent Knowingly And/Or Purposely Killed Ms. Guzzo.

The court of appeals ultimately determined that the jury instruction in this case violated respondent's due process rights, as it imposed upon him a burden to establish by a preponderance of the evidence that he suffered from a mental disease or defect which prevented him from having a knowing or purposeful mental state in connection with the killing of Ms. Guzzo. In reaching this conclusion the court of appeals agreed with the state supreme court's interpretation of federal constitutional law. According to the Supreme Court of New Jersey, N.J. Stat. Ann. 2C:4-2 only requires a defendant to establish that a mental disease or defect relevant to the requisite mental state exists, not that the condition negates an essential element of the crime charged. *State v. Breakiron*, 108 N.J. 591, 611-13, 532 A.2d 199, 209-10 (1987). Requiring a defendant to negative an element, according to the state supreme court, would result in a constitutionally impermissible burden-shifting. *State v. Zola*, 112 N.J. 384, 399, 548 A.2d 1022, 1029-30 (1988), *cert. denied*, 109 S. Ct. 1146 (1989); *State v. Breakiron*, 108 N.J. at 611-13, 532 A.2d at 209-11. Since the Third Circuit perceived that the instruction in this case was unconstitutional, it thereupon concluded respondent's murder conviction could not be sustained under *Francis v. Franklin*, 471 U.S. 307 (1985). Petitioners emphatically assert that this determination by the court of appeals was erroneous. See Paragraphs B and C, *infra*.

What is more alarming about the Third Circuit's opinion—beyond its unconscionable vacating on collateral appellate review of a state murder conviction obtained on a record that could not reasonably result in a verdict of other

than knowing or purposeful murder, see *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)—is its misinterpretation of *Martin v. Ohio*, 480 U.S. 228, *reh'g denied*, 481 U.S. 1024 (1987). The court of appeals placed in jeopardy not only those New Jersey convictions obtained in trials where the court utilized the proposed "*Zola*" charge (App. A, at pp. 17a-18a), but other prosecutions involving any evidentiary burden on a defendant.

In *Martin*, this Court considered the constitutionality of a state statutory scheme placing the burden of proving self-defense by a preponderance of the evidence upon a defendant who was charged with aggravated murder. According to this Court, no constitutional due process violation occurred, where the jury was instructed that the State had the never-shifting burden of proving the elements of the charged offense beyond a reasonable doubt, where a conviction could be sustained only upon the carrying of this burden by the State, where the verdict obviously reflected that the evidence adduced did not create a reasonable doubt and where the defendant had the opportunity to justify her killing of the victim by establishing that she acted in defense of self. *Martin v. Ohio*, 480 U.S. at 233. This Court added a precautionary aside:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of Winship's mandate. 397 US, at 364. . . .

*Id.* at 233-34. The instructions were satisfactory because they conveyed to the jury that it must consider all evidence, even that going to self-defense, in determining whether there was a reasonable doubt concerning the sufficiency of the State's proofs. *Id.* at 234. But see note 3,

*infra*. Accordingly, this Court characterized itself as "not moved" by assertions of "overlap" in the evidence, as there was no unconstitutional burden-shifting and the self-defense evidence could mandate an acquittal by either supporting a finding of reasonable doubt as to the State's case or reaching a preponderance level. *Martin v. Ohio*, 480 U.S. at 234.

The Third Circuit has taken the "[i]t would be quite different . . ." language from *Martin* to underlie its conclusion that N.J. Stat. Ann. 2C:4-2 is facially constitutionally infirm, as interpreted by the state supreme court, and further, has intimated that the unconstitutionality is judicially irremediable. (App. A, at pp. 23a-26a). While agreeing that a jury can deliberate and reach a verdict resulting in a constitutional conviction when it finds it more likely than not a defendant suffers from a mental disease or defect, the court of appeals nevertheless perceived itself compelled to find that under either the instruction as given in this case, or the instruction approved by the state supreme court in *Zola*, the jurors unequivocally would not consider mental disease or defect evidence amounting to less than a preponderance of the evidence in determining whether there was a reasonable doubt with respect to the State's case. (*Id.* at pp. 25a-26a). The court reached this conclusion even though neither charge affirmatively instructed the jurors to disregard evidence of mental disease or defect that did not meet the preponderance threshold. "[W]e believe the proposed charge would have precisely the same effect as the hypothetical charge condemned in *Martin*." (*Id.* at p. 26a). This determination is decidedly erroneous.

This Court could not have meant in *Martin* that an affirmative instruction to the jurors specifically admonishing them to consider evidence relevant to the defense in determining whether there was a reasonable doubt as to the crime charged, even if the evidence did not rise to a certain level of persuasion, was necessary to satisfy due process demands. Indeed, the jury instruction in the state court in *Martin* itself contained no such articulated ad-

monition.[3] So too, *In re Winship*, 397 U.S. 358 (1970), makes no such demand. The portion of *In re Winship*, 397 U.S. 358, relied on by this Court in support of the above-cited precautionary language addresses the constitutional necessity of a reasonable doubt standard in criminal prosecutions and states the *Winship* holding, that is, "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364. Hence, an affirmative preclusion by the state of reliable evidence otherwise admissible, see *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 655 (1988), that would serve to create a reasonable doubt as to guilt or an instruction telling jurors to disregard such evidence would violate a defendant's right to due process because the State's burden—to prove the elements of the offense charged *beyond a reasonable doubt*—would be efficiently and effectively lessened. There is no reason to conclude, however, that jury instructions, like those in *Martin*, which specifically articulate, and describe where necessary, the presumption of innocence and the State's never-shifting burden of proof beyond a reasonable doubt are inadequate.

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[3] The charge to the jury in *Martin* stated, in pertinent part, that the State had the burden to prove each material allegation beyond a reasonable doubt, that defendant is clothed with a presumption of innocence overcome only if the proof excludes every reasonable doubt as to guilt; that the case is to be decided on the evidence; that the State has to prove its case beyond a reasonable doubt and the defendant has the burden of proving self-defense by a preponderance; that "[i]n determining whether or not an affirmative defense has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that affirmative defense regardless of who produced it;" "that [i]f the weight of the evidence is equally balanced," then the affirmative defense has not been established, and that the jury is to consider all the evidence and render an impartial, unbiased verdict. (Joint Appendix at 6, 19, 21, 22, *Martin v. Ohio*, 480 U.S. 228 (No. 85-6461)). See also *Martin v. Ohio*, 480 U.S. at 240 (Powell, J., dissenting)(the instructions "gave little guidance" with respect to the capacity of self-defense evidence to create a reasonable doubt even if it did not rise to the level necessary to establish the affirmative defense).

Indeed, other lower courts have not misconstrued *Winship* and *Martin* in this manner. For example, in *Smart v. Leeke*, 677 F. Supp. 414, 417 (D.S.C. 1987), *aff'd*, 856 F.2d 609 (4th Cir. 1988), *rev'd on rehearing and remanded*, No. 87-7737 (4th Cir. May 4, 1989) (en banc) (LEXIS 6172, 1989 U.S. App. file), the jury simply was told that " '[t]he defendant is entitled to any reasonable doubt arising in the whole case or in any defense.' " While both the district court and the court of appeals determined the habeas corpus writ should issue in this affirmative defense case involving self-defense, the en banc court of appeals disagreed. A clear articulation of the State's burden of proof and the fact that the jury was "not restricted" from considering the admittedly overlapping self-defense evidence in deciding whether there existed a reasonable doubt as to the sufficiency of the State's proofs were sufficient to sustain the conviction. *Smart v. Leeke*, No. 87-7737 (4th Cir. May 4, 1989) (en banc) (LEXIS 6172, 1989 U.S. App. file) (opinion at 8, 9, 10). Similarly, in *State v. Bedford*, 39 Ohio St. 3d 122, 529 N.E.2d 913 (1988), the Ohio Supreme Court concluded that it was constitutionally permissible to require a defendant to establish the defense of voluntary intoxication by a preponderance of the evidence because the State's burden of proving its case beyond a reasonable doubt was clearly articulated and the jury was "permitted" to consider whether the intoxication evidence created a reasonable doubt as to the defendant's guilt. *Id.* at 131, 529 N.E.2d at 922; see also *United States v. Molina-Uribe*, 853 F.2d 1193, 1205 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1145 (1989) (approving, with a "compare" reference to *Martin*, an instruction admonishing the jurors not to allow any fact, no matter how trivial, bearing on the issue of malice to escape their careful consideration).

Indeed, in another Third Circuit case on a not unrelated issue, the court of appeals, rejecting the government's assertion that the Insanity Defense Reform Act intended to bar evidence of mental abnormality on the issue of *mens rea*, cited *Martin* for the proposition that there is no governmental "right" to prevent a defendant from showing

self-defense to prove he did not act with a "prior calculation and design" *mens rea*. *United States v. Pohlot*, 827 F.2d 889, 900-01 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988). The court said the *exclusion* of this evidence would violate the dictates of *In re Winship*, 397 U.S. 358. *United States v. Pohlot*, 827 F.2d at 901.

The Third Circuit unfortunately extended this principle too far in the present case. To the extent the court of appeals concluded that an affirmative instruction was required under *Martin v. Ohio* to enable the jurors to consider evidence of mental disease or defect, the court has misconstrued this Court's decision in that case. This Court never said that a clearly articulated mandate to the jurors to consider affirmative defense evidence not rising to the level of preponderance of the evidence was critical to a constitutional prosecution. This Court only condemned an affirmative *preclusion* of consideration of such evidence. To the extent the Third Circuit viewed the instruction herein as tantamount to the admittedly hypothetical explanatory example in *Martin v. Ohio*, 480 U.S. at 233-34, petitioners urge that this determination is an unwarranted, far-reaching distortion of this Court's statement of the law in this area.

Even more significantly, to the extent the court of appeals has wholly invalidated N.J. Stat. Ann. 2C:4-2 as constitutionally irremediable, *contra People v. Kohl*, 72 N.Y.2d 191, 527 N.E.2d 1182, 531 N.Y.S.2d 45 (1988)[4] — as the opinion fairly can be read to conclude, based upon

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[4] New York has resolved the issue of a *potential* unconstitutionality resulting from the overlapping nature of proofs underlying the insanity defense and the state's burden of establishing beyond a reasonable doubt the formation of a conscious objective to kill another person. The court stated the jury charge should emphasize the People's "primary, ultimate, and nontransferable burden of proving all the elements of criminal intent beyond a reasonable doubt," should also refer to defendant's burden of insanity as "different," and should require the jurors to consider the insanity evidence in considering whether the People established their proofs beyond a reasonable doubt. *Id.* at 197, 198-99, 527 N.E.2d at 1185, 1186.

the court of appeals' concern with the inherent constitutionality of the statute—the court has reached an unwarranted conclusion placing at risk, if the reasoning is followed, prosecutions involving legitimate, albeit sometimes overlapping, affirmative defenses which a defendant may constitutionally be required to prove by a preponderance of the evidence. In short, the opinion, obviously offering no constitutional resolution compatible with the statutory language, might be construed as a determination that no charge can effectively meet constitutional due process demands where there is an overlap between the proofs underlying the affirmative defense and the essential elements of the crime charged. The court of appeals effectively reached this conclusion by its patent disavowal (App. A, at p. 25a n.3) of an earlier opinion, *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929 (3d Cir.), *cert. denied*, 449 U.S. 844 (1980), where it had concluded the State constitutionally could burden a defendant with proving voluntary intoxication (which by statute was available as a defense "only if it negatives the elements of intention required for the commission of the offense") by a preponderance of the evidence.

At a minimum, the judgment of the court of appeals will impact upon collateral habeas proceedings in all New Jersey cases where the defense of mental disease or defect is an issue and is charged to the jury. Moreover, the impact of the opinion is not limited to New Jersey as the reasoning of the court of appeals, if adopted by other jurisdictions, could jeopardize otherwise valid and constitutional prosecutions involving an overlap between affirmative defense proofs and the elements of the crime. Petitioners submit that in all respects the court of appeals has misconstrued and improperly utilized *Martin v. Ohio* to declare invalid, in a collateral review proceeding, a statute that heretofore has survived every other challenge. This determination, and the inevitable confusion and decidedly unfair results emanating therefrom, must be rectified by this Court.

**B. The Jury Instructions In This Case Which Placed The Burden On Respondent Of Proving By A Preponderance Of The Evidence The Affirmative Defense Of Mental Disease Or Defect Did Not Impermissibly Shift To Respondent The Burden Of Proof On The Intent Element Of The Offense.**

The court of appeals found in this case that the instruction given the jury on the affirmative defense of mental disease or defect impermissibly shifted to respondent the burden of proof on an element of the offense, contrary to this Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Petitioners contend that the jury instruction on this affirmative defense was in accord with this Court's decisions in *Martin v. Ohio*, 480 U.S. 228, *reh'g denied*, 481 U.S. 1024 (1987), and *Patterson v. New York*, 432 U.S. 197 (1977). The jury was clearly instructed that the State had the never-shifting burden of proving all the elements of the offense of murder beyond a reasonable doubt, including that respondent committed the instant homicide knowingly or purposely. The jury instructions in this case did not require respondent to disprove an element of the charged offense; nor did they impermissibly shift the burden of proof to respondent.

In *State v. Breakiron*, 108 N.J. 591, 532 A.2d 199 (1987), the Supreme Court of New Jersey examined N.J. Stat. Ann. 2C:4-2 and rejected that defendant's contention that the statute impermissibly shifted the burden of disproving an essential element of the offense. *Id.* at 610-11, 532 A.2d at 209-11; accord *State v. Zola*, 112 N.J. 384, 399, 548 A.2d 1022, 1029-30 (1988), *cert. denied*, 109 S. Ct. 1146 (1989). According to the *Breakiron* court, the statute "means only what it says, that the defendant must show that he or she suffered from a mental disease or defect that is relevant to the mental state of the offense." *Id.* at 611, 532 A.2d at 209. Indeed, the *Breakiron* court reaffirmed the conclusion reached in this case by the Superior Court of New Jersey, Appellate Division, in determining that the merits of respondent's direct appeal, namely that the "defense" set out in N.J. Stat. Ann. 2C:4-

2 does not serve to defeat a case already established by the State, but simply refers to " 'psychiatric or other evidence contesting the State's thesis that the accused acted with the mental state required to be proven in order to convict.' " *Id.* at 610, 532 A.2d at 209 (citing *State v. Humanik*, 199 N.J. Super. 283, 294-95, 489 A.2d 691, 697 (App. Div.), *certif. denied*, 101 N.J. 266, 501 A.2d 934 (1985). (App. F, at p. 62a).

While N.J. Stat. Ann. 2C:4-2 functions to establish that an essential element of the crime may be lacking, it does not shift a burden onto a defendant with respect to that essential element because the State has the burden, as juries are adamantly admonished, to prove each element beyond a reasonable doubt. *State v. Breakiron*, 108 N.J. at 612-13, 532 A.2d at 209-10. It is clear that the presence or absence of mental disease or defect is not an essential element of the crime of murder as defined by the Legislature. *Id.* at 614, 532 A.2d at 210; see N.J. Stat. Ann. 2C:11-3. N.J. Stat. Ann. 2C:4-2 serves merely to sanction the adduction before the jury of competent, reliable evidence tending to deny " 'the existence of facts which the State must prove to establish [the essential elements of. . . .' " purposeful or knowing homicide. *Id.* at 617, 532 A.2d at 212. It is within the province of the jury to determine whether a defendant has established by a preponderance of the evidence that the alleged mental disease or defect exists and whether, even if the condition is extant, the State has nevertheless proven beyond a reasonable doubt all the elements of the charged crime, including the requisite mental state. *Id.* at 620, 621, 532 A.2d at 214-15.

The trial in the instant matter was conducted before the *Breakiron* and *Zola* decisions were issued by the New Jersey Supreme Court. Nevertheless, the charge given in this case is consistent with those opinions of the state supreme court and did not violate respondent's due process rights.

In reviewing jury instructions, this Court must not review the challenged remark in isolation but must view it

in the context of the entire charge. *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). The relevant inquiry in reviewing a jury instruction is not whether an impermissible interpretation, however improbable, is possible. It is instead what a reasonable juror could have understood the charge as meaning. *Mills v. Maryland*, 486 U.S. ___, 108 S. Ct. 1860, 1873 (1988) (Rehnquist, C.J., dissenting); *California v. Brown*, 479 U.S. 538, 541 (1987). The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the validity of a state court's judgment is even greater than that required for direct review. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The petitioner must show that "the ailing instruction *by itself* so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. at 147 (emphasis added). If the instruction is merely erroneous or undesirable, that will be insufficient to grant relief on collateral review. *Id.*

Respondent clearly failed to meet his burden in this case. Indeed, a review of the charge given reveals that no prejudicial error was committed. The trial judge charged the jury that respondent was presumed innocent and that he has "no duty or obligation to prove he's innocent." (App. G, at p. 76a). The jury was strongly instructed several times throughout the charge that the burden of proving beyond a reasonable doubt all the elements of the offense rested exclusively on the State and never shifted to defendant. (App. G, at pp. 77a, 81a-83a).

After explaining the elements of murder and the State's burden to prove the existence of each and every element beyond a reasonable doubt, the trial judge instructed the jury on the affirmative defense of mental disease or defect. (See Statement of the Case, *supra*, at p. 8 ) The court made it clear that respondent could be found guilty of murder only if after considering all of the testimony and evidence in the case, the jurors found that the State proved beyond a reasonable doubt that respondent either purposely or knowingly caused the death of the victim and the respondent failed to carry his burden on the defense

of mental disease or defect. (App. G, at p. 82a-83a). The jury was also instructed that respondent must be found not guilty of murder if after considering all the evidence and testimony the jurors found that the State "failed to prove each and every element of the crime of murder" and respondent carried his burden of proving the defense of mental disease or defect. (*Id.*).

The charge made it clear at all times that the State bore the burden of proving beyond a reasonable doubt every fact necessary to establish the offense charged. *In re Winship*, 397 U.S. 358 (1970). Respondent was merely required to show by a preponderance of the evidence that he suffered from a mental disease or defect such that he was incapable of forming the intent necessary to act purposely or knowingly. The constitutional infirmity denounced in *Mullaney v. Wilbur*, 421 U.S. 684, is not present here.

In *Mullaney v. Wilbur*, this Court found a due process violation in a Maine rule of law and corresponding jury instruction providing that if the prosecution proved a homicide was intentional and unlawful, the murder element of malice aforethought was "conclusively implied" unless the accused proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation; upon this proof, the homicide was reduced from murder to manslaughter. *Id.* at 685-87. In declaring the Maine murder statute unconstitutional, this Court relied heavily on the fact that premeditation historically was "the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Id.* at 696. In essence, Maine's statutory scheme could be viewed as an attempt by the State to evade its responsibility to establish premeditation beyond a reasonable doubt by presuming all killers to be guilty of murder unless they established the contrary. This Court concluded that this burden-shifting which required a defendant to "to prove the critical fact in dispute" dramatically increased the likelihood of an er-

roneous murder conviction and was constitutionally impermissible. *Id.* at 699-701.

Unlike *Mullaney*, the charge in the instant matter did not create any presumptions that respondent was guilty of murder. Nothing improper was presumed or implied against respondent. In this respect, the instant case is more akin to the situation presented in *Patterson v. New York*, 432 U.S. 197. In *Patterson*, the defendant was charged with second-degree murder which required a showing that defendant intentionally caused the death of another. *Patterson v. New York*, 432 U.S. at 198. The charge could be reduced to manslaughter, however, if the defendant demonstrated by a preponderance of the evidence that he was acting under an extreme emotional disturbance. *Id.* at 206. This Court perceived no constitutional infirmity in requiring an accused to carry the burden of persuasion on an affirmative defense that "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder." *Id.* at 206-07. While recognizing that constitutional limits will not allow state legislatures to declare an accused guilty or presume guilt or reallocate burdens by labeling as affirmative defenses what have always been elements of the particular crime, this Court refused to adopt, as constitutionally mandated, a blanket rule that a State has to "disprove beyond a reasonable doubt any and all affirmative defenses relating to the culpability of the accused." *Id.* at 210.

Most recently, in *Martin v. Ohio*, 480 U.S. 228, this Court found no due process violation in a state prosecution for aggravated murder, defined as " 'purposely, and with prior calculation and design, caus[ing] the death of another,' " *id.* at 230, where the jury was instructed that the state bore the never-shifting burden of proof beyond a reasonable doubt of all the elements of the crime, and that the accused could be acquitted if she proved by a preponderance of the evidence that she acted in self-defense. *Id.* at 233. This Court rejected the defendant's contention that there was an impermissible "overlap" to the extent that evidence of the elements of self-defense may

tend to negate the elements of aggravated murder, *id.* at 234, because, according to this Court, the overlap, if extant, does not constitute an unconstitutional shifting to the defendant of a burden to disprove any element of the state's case. *Id.* In *Martin* this Court recognized that the Ohio statute, as implemented, served to allow the adduction of evidence that could function either to create a reasonable doubt about the existence of a fact necessary to conviction or to excuse the homicide notwithstanding that the State had convinced the jurors that an accused had purposely and with prior calculation and design caused the death of another. *Id.* Indeed, this Court considered the fact that the evidence of self-defense could be utilized by the jurors in their determination of whether the State sustained its burden as militating in favor of a finding of constitutionality. *Id.*

Petitioners contend that the court of appeals erred in concluding that the jury instruction given in this case on the defense of mental disease or defect impermissibly shifted to respondent the burden of proof on an element of the offense. The instruction demonstrates that respondent was certainly not obligated to prove or disprove an element of the charged crime, *cf. Mullaney v. Wilbur*, 421 U.S. 684, as the presence or absence of mental disease or defect is not an element of the crime of murder. *State v. Breakiron*, 108 N.J. at 613, 532 A.2d at 210. The charge in this case ensured that respondent could be convicted on no less than the establishment beyond a reasonable doubt that he caused the victim's death with a conscious object to, or with knowledge that shooting her in the forehead would, cause death or serious bodily injury resulting in death. See N.J. Stat. Ann. 2C:2-2b(1) and (2); N.J. Stat. Ann. 2C:11-3a(1), (2); *Patterson v. New York*, 432 U.S. at 206-07; *In re Winship*, 397 U.S. at 364; *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929 (3d Cir.), *cert. denied*, 449 U.S. 844 (1980) (no constitutional infirmity where state requires an accused to prove voluntary intoxication by a preponderance of the evidence).

Moreover, respondent was afforded the opportunity—unavailable in many states[5] —to adduce evidence for the jurors' consideration as to an alleged mental disease or defect that would be relevant to a jury finding with respect to purposeful or knowing conduct, where at all times conviction for murder was not possible absent proof beyond a reasonable doubt that he purposely or knowingly committed the homicide. There was no unconstitutional shifting of the State's burden herein and no essential element of the offense was presumed until respondent disproved it. *Martin v. Ohio*, 480 U.S. at 233. Accordingly, the societal interest in the reliability of jury verdicts, a concept underlying the ultimate determinations in both *In re Winship*, 397 U.S. 358, and *Mullaney v. Wilbur*, 421 U.S. 684, was not compromised herein. There was no possibility, let alone likelihood, that respondent was erroneously convicted. *Mullaney v. Wilbur*, 421 U.S. at 699-701. He was not denied due process by the jury instruction imposing a burden to prove the existence of mental disease or defect by a preponderance of the evidence, and the court of appeals clearly erred in reaching such a conclusion.

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[5] The following jurisdictions reject the admission of any evidence of mental disease or defect short of insanity. *State v. Schantz*, 98 Ariz. 200, 403 P.2d 521, *cert. denied*, 382 U.S. 1015 (1965); *Bates v. State*, 386 A.2d 1139, 1143-44 (Del. 1978); *Bethea v. United States*, 365 A.2d 64, 83-92 (D.C. App.), *cert. denied*, 433 U.S. 911 (1976); *Zeigler v. State*, 402 So.2d 365, 373 (Fla.), *cert. denied*, 455 U.S. 1035 (1981); *State v. Wood*, 235 Kan. 915, 686 P.2d 128, 135 (1984); *State v. Murray*, 375 So.2d 80, 87 (La. 1979); *Johnson v. State*, 292 Md. 405, 439 A.2d 542, 554 (1982); *State v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982); *Cannaday v. State*, 455 So. 2d 713, 720 (Miss. 1984), *cert. denied*, 469 U.S. 1221, 469 U.S. 1229 (1985); *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982); *Stamper v. Commonwealth*, 228 Va. 707, 324 S.E.2d 682 (1985); *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2, 13-14 (1980); *Dean v. State*, 668 P.2d 639, 644-45 (Wyo. 1983); see *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984); Annotation, *Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R. 3d 1228 (1968).

### C. Even If The Jury Instructions Given In This Case Impermissibly Shifted The Burden Of Proof To Respondent With Respect To His Mental State On The Date Of The Murder, The Court of Appeals Erred In Not Applying The Harmless Error Doctrine to the Instruction In This Case.

Even if the court of appeals correctly found that the instruction given to the jury on the defense of mental disease or defect impermissibly shifted the burden of proof to respondent, the court of appeals nevertheless erred in failing to apply a harmless error analysis to the erroneous instruction in accordance with this Court's opinion in *Rose v. Clark*, 478 U.S. 570 (1986). Instead, the circuit court relied upon this Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985), in holding that the erroneous instruction required a reversal of respondent's murder conviction.

In *Chapman v. California*, 386 U.S. 18, *reh'g denied*, 386 U.S. 987 (1967), this Court found that not all constitutional errors mandate an automatic reversal of a conviction, but rather that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless. *Id.* at 22. This Court has " 'repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' " *Rose v. Clark*, 478 U.S. at 576 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). The errors to which *Chapman* is inapplicable are the exception and not the rule. *Rose v. Clark*, 478 U.S. at 578; *United States v. Hasting*, 461 U.S. 499, 509 (1983).

In *Rose v. Clark*, this Court resolved a question that had been left unanswered in *Francis v. Franklin*, 471 U.S. 307, and which had been in doubt since the plurality opinion in *Connecticut v. Johnson*, 460 U.S. 73 (1983), concerning whether unconstitutional burden-shifting instructions could ever constitute harmless error under

*Chapman*. This Court found that the harmless error analysis was applicable to jury instructions that violate the principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Francis v. Franklin*, 471 U.S. 307. *Rose v. Clark*, 478 U.S. at 582. Specifically, this Court found that the error involved—an instruction that impermissibly shifted the burden of proof on malice—was not "so basic to a fair trial" that it could never be harmless. *Id.* at 580. Absent a constitutional error that renders a trial fundamentally unfair, a conviction should be affirmed "where the reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt." *Id.* at 577-79.

Recently in *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 3120 n.5 (1987), this Court reaffirmed its holding in *Rose*. In discussing the court of appeals' determination of harmless error in a jury charge that impermissibly shifted the burden of proof on the question of the petitioner's criminal intent to commit murder, this Court observed that " 'the evidence was so dispositive of intent' that it can be said beyond a reasonable doubt that 'the jury would have found it unnecessary to rely on the presumption.' " *Id.* (citing *Rose v. Clark*, 478 U.S. at 583). Similarly, in *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 1922 n.6 (1987), this Court explained that the application of harmless error analysis to an impermissible burden-shifting instruction does not suggest that the reviewing court can somehow "retrace the jury's deliberative processes." Rather, it requires the reviewing court to find "that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same." *Id.*

The court of appeals herein determined that the jury instruction on the defense of mental disease or defect impermissibly shifted to respondent the burden of proof on the intent element of the offense (App. A, at p. 22a), and that the instruction violated the principles set forth in *Sandstrom v. Montana*, 442 U.S. 510, and *Francis v. Franklin*, 471 U.S. 307. Nevertheless, the court of appeals inexplicably neglected to apply the *Chapman* analysis to

the jury instruction involved, despite the harmless error argument advanced by petitioners before that court and the district court's determination that any error in assessing burdens was harmless beyond a reasonable doubt. (See App. C, at pp. 39a-40a). It is petitioners' contention that even if the instruction on mental disease or defect impermissibly shifted the burden of proof in this case, the error was harmless beyond a reasonable doubt and thus the court of appeals erred under *Rose v. Clark*, *Burger v. Kemp* and *Pope v. Illinois*.

Petitioners submit that the record in this case clearly demonstrates that the State's evidence of respondent's intent was so dispositive that even if the trial judge had not instructed the jury that respondent had the burden of proving by a preponderance of the evidence that he had a mental disease or defect that prevented him from having the requisite mental state, the verdict in this case would have been the same. The record herein establishes that respondent embarked on a deliberate, calculated course of conduct—involving the acquisition of a gun, a knife and ammunition and confrontations with Ms. Guzzo—before the evening of August 11, 1981, when he fatally shot her in the head. On that evening, according to the testimony of eyewitness Stanley Emanuels, who was invited to the Guzzo home by Ms. Guzzo, respondent, armed with a gun and a knife, entered the home surreptitiously while the victim was out putting the dog away and Emanuels went out to his automobile for a minute. Respondent, holding the weapons on Emanuels, demanded to know who he was and why the young man was there. Respondent then proceeded to try to persuade Lisa to remain his girlfriend, at one point ripping the telephone off the wall when the young woman indicated an intention to call her parents. Respondent also questioned Emanuels as to any possible sexual relationship between Ms. Guzzo and him. According to Emanuels, it appeared respondent "was there for a reason." Respondent was coherent, "sweaty, yet calm," and both Emanuels and Lisa understood respondent without difficulty. At approximately 11:30 p.m., as Lisa's par-

ents' automobile was heard in the driveway, respondent stated, "This is where I make my exit," shot Lisa once in the forehead and left.

Moreover, a review of the entire jury instruction given in this case reveals that on the whole, it delivered a correct interpretation of the law. *California v. Brown*, 479 U.S. at 541. No evidence was precluded from the jury's consideration in determining whether the State met its burden of proof in this case. Thus there was no question that after hearing the instructions in this case the jury was aware that the burden remained on the State to prove beyond a reasonable doubt all the elements of the offense and that it could consider all the evidence in the case, including the psychiatric testimony, in determining whether the State met its burden in this case.

This Court plainly has the authority to decide whether on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard. *Pope v. Illinois*, 107 S. Ct. at 1922-23; *Rose v. Clark*, 478 U.S. at 584. While this Court has exercised this authority sparingly, *id.*, petitioners believe that the facts of this particular case justify the Court's intervention in this matter. Petitioners urge that on this record, where there is no doubt that respondent acted with the requisite culpability when he killed Ms. Guzzo, and where the jurors heard expert testimony as to respondent's mental state and were allowed to deliberate thereupon, with clear instructions as to the State's burden to prove all elements of the offense beyond a reasonable doubt, any error was surely harmless beyond a reasonable doubt and certainly did not justify granting of a writ of habeas corpus. *Engle v. Isaac*, 456 U.S. 107, 126-28, 134-35, *reh'g denied*, 456 U.S. 1001, 457 U.S. 2976 (1982). As the record establishes respondent's guilt beyond a reasonable doubt, "the interest in fairness has been satisfied." *Rose v. Clark*, 478 U.S. at 579.

Even if this Court declines to undertake an analysis of the facts in order to render a harmless error determina-

tion, petitioners submit that a remand to the court of appeals is warranted. The court of appeals has not yet applied the *Chapman* harmless error analysis to the facts of this particular case and petitioners contend that a remand is warranted to that court for a determination of whether any charging error in this case was harmless beyond a reasonable doubt. *See, e.g., Pope v. Illinois*, 107 S. Ct. at 1922-23; *Rose v. Clark*, 478 U.S. at 584.

## CONCLUSION

Based upon the foregoing, petitioners urge the granting of this petition for a writ of *certiorari*. Under prior law, the court of appeals' invalidation of a state statute (which had already survived judicial scrutiny in the state courts) would have provided an appeal as of right to this Court. See 28 U.S.C. sec. 1254(2) (*repealed by* Act of June 27, 1988, effective September 25, 1988, Pub. L. 100-352 (1988)). Petitioners assert that the irreconcilable conflict between the state supreme court and the federal court of appeals in the courts' respective reviews of the statutory defense at issue provides a basis for granting the writ. An even more compelling reason for the invocation of *certiorari* jurisdiction is that the judgment of the United States Court of Appeals for the Third Circuit, rendered on review of a denial of federal habeas corpus relief, not only distorts *Martin v. Ohio*, 480 U.S. 228, but also puts at risk criminal prosecutions where the State has legitimately burdened a defendant with establishing an affirmative defense.

Review is warranted by this Court in order to clarify the meaning of the precautionary aside of *Martin* and to provide guidance to lower courts with respect to jury instructions in criminal prosecutions involving affirmative defenses. The court of appeals' disregard for the precedent of this Court and refusal to consider whether any error can be harmless also warrant review by this Court in a case where every other pertinent judicial review has unequivocally resulted in affirmance of respondent's conviction for murder.

Respectfully submitted,

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*Of Counsel and on the Petition*

DATED: MAY 22, 1989

# APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 88-5098

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JOHN MICHAEL HUMANIK, JR.,

Appellant

vs.

HOWARD BEYER, WARDEN

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On Appeal From the United States District Court
For the District of New Jersey (Trenton)
(D.C. Civil Action No. 85-5455)

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Argued October 20, 1988

BEFORE: STAPLETON, SCIRICA, and COWEN,
*Circuit Judges*

(Opinion Filed March 31, 1989)

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*OPINION OF THE COURT*

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STAPLETON, *Circuit Judge*:

We are asked in this habeas corpus proceeding to consider the constitutionality of New Jersey's so-called "diminished capacity" statute, N.J.Stat.Ann. § 2C:4-2, which requires that the defendant bear the burden of proving by a preponderance of the evidence the existence of a mental disease or defect "which would negate a state of mind which is an element of the offense." The district court held that neither the statute nor the instructions to the jury in the petitioner's case violated the petitioner's due process right to have the state prove each and every element of the crime charged beyond a reasonable doubt. We conclude, however, that the trial court's charge did not conform to the dictates of due process. Moreover, we also conclude that the constitutional problem in this case arises not only from the particular approach taken by the trial court in its instructions but also from the diminished capacity statute itself.

I.

The facts surrounding the crime for which the petitioner, John Humanik, was convicted are essentially uncontroverted. *See State v. Humanik*, 199

N.J. Super. 284, 489 A.2d 691 (N.J. Super. Ct. App. Div.), *certif. denied*, 101 N.J. 266, 501 A.2d 934 (1985). On June 4, 1982, Humanik was sentenced to a term of life imprisonment, and ordered to serve 25 years without being eligible for parole, for the murder of his former girlfriend of three years, Lisa Ann Guzzo. He became involved with Ms. Guzzo in 1978, when he was 17 and she was just 13, and had over the course of their relationship developed a strong attachment to the entire Guzzo family, referring to victim's mother as "mom" and frequently staying at the Guzzo family home. This attachment was attributed, at least in part, to Humanik's emotionally deprived upbringing, having been abandoned by his mother and having spent an extended period of time in a foster home before eventually being raised by an aunt.

The sequence of events leading to the murder began on August 5, 1981, when Ms. Guzzo told Humanik that she wanted to end the relationship and date another man. Over the next several days, Humanik made repeated attempts to convince Ms. Guzzo not to leave him, but was unsuccessful. On August 11, the evening of the murder, after procuring his uncle's gun a few days earlier and purchasing the necessary ammunition, Humanik went to the Guzzo's home, ostensibly to determine the identity of her new boyfriend. Humanik entered the home and at gunpoint ordered Ms. Guzzo's sister and new boyfriend who were also in the house to be seated while he spent several hours trying to persuade Ms. Guzzo to take him back.

At 11:30 p.m., upon the return home of the victim's parents, Humanik pointed the gun at Ms. Guzzo and fired the fatal shot. He immediately fled from the scene of the shooting, traveling to New York, North Carolina, Florida, and ultimately Las Vegas where he eventually was apprehended approximately two months later.

At trial, Humanik conceded that he shot and killed Ms. Guzzo at her family home. The sole contested issue was Humanik's state of mind at the time of the shooting. His defense was that he did not intend to kill Ms. Guzzo and therefore lacked the requisite *mens rea* for murder.[1] More specifically, Humanik contended that he suffered from a mental disease or defect that deprived him at the time of the shooting of the capacity to formulate an intent to kill Ms. Guzzo. This line of defense implicated New Jersey's "diminished capacity" statute which provides as follows:

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1. Murder is defined under the New Jersey Code in pertinent part:

> a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:
> (1) The actor purposely causes the death or serious bodily injury resulting in death; or
> (2) The actor knowingly causes death or serious bodily injury resulting in death:...

N.J.Stat.Ann. § 2C:11-3. The terms "purposely" and "knowingly" are defined as follows:

> (1) *Purposely*. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist....
>
> (2) *Knowingly*. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result.

N.J.Stat.Ann. § 2C:2-2b(1) & (2).

2C:4-2 Evidence of mental disease or defect admissible when relevant to element of the offense

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. *Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.*

N.J.Stat.Ann. § 2C:4-2 (emphasis supplied). In the alternative, Humanik also claimed that the shooting was accidental.

In the interest of avoiding confusion, we digress at this point from our account of the facts and procedural history of this matter to note that the phrase "diminished capacity," while widely used in this context, does not accurately describe the content of the statute. As the text indicates, the defense referred to is relevant only when the disease or defect "negates," that is renders one *wholly without capacity* to have, the particular state of mind required as an element of the offense. The potential for confusion is exacerbated further by the fact that the phrase "diminished capacity" can evoke notions of diminished culpability associated with defenses that excuse or justify conduct that fully satisfies all elements of the offense charged, as for example, the defenses of insanity and self-defense.

Humanik relied on the opinion of two experts as the basis for his defense; Dr. Seymour Kuvin testified that Humanik suffered from Borderline Personality

Disorder, app. at 161, and Carl Einhorn, Ph.D., diagnosed Humanik's psychology as "schizo-affected psychosis." App. at 165. Both experts expressed the opinion that Humanik did not act knowingly or purposely in killing Guzzo. App. at 18. In rebuttal, the state offered two expert witnesses. John P. Motley, M.D., and Alvin Krass, Ph.D., agreed that Humanik suffered from a personality disorder, but nevertheless opined that it did not affect his ability to perform acts knowingly or purposely. App. at 18, 154, 155.

In the face of the conflicting expert testimony, the central issue at trial, which remains of principal importance in this proceeding, concerned which party bore the burden of persuasion on the issue of Humanik's purported inability to formulate purpose or intent. Humanik presented the trial court with two separate theories why requiring the defendant to prove a "mental disease or defect which would negate a state of mind which is an element of the offense," as suggested by the language of the statute, violated the Constitution.

First, he noted that the statute's last sentence, which explicitly places the burden of proof on the defendant, did not become effective until September 24, 1981. *See* L. 1981, c. 290, § 8 (effective Sept. 24, 1981). Although Humanik was tried after the effective date, in June of 1982, he nevertheless committed the crime before September 24, 1981, on August 11, 1981. As such, according to Humanik, because the change in law was substantive, not merely procedural, and additionally because it disadvantaged him, applying the 1981 amendatory language in his case would violate the prohibitions of the Constitution's *ex post facto* clause.

Second, he claimed that, in any event, by placing the burden on the accused to prove a mental disease or defect defense by a preponderance of the evidence, the

statute violates the due process requirement that the state must prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 98 S.Ct. 1068, 25 L.Ed.2d 323 (1970). Humanik argued that a mental disease or defect defense, unlike other exculpating defenses such as insanity or self-defense which serve to excuse or justify a crime, operates solely to negative the state of mind which is an element of the offense. Accordingly, the only burden which can constitutionally be placed on the accused with respect to such a defense is the burden to come forward with competent evidence of mental disease or defect. Once the accused satisfies that obligation, the issue of mental disease or defect is one for the jury and the state must shoulder the burden of disproving beyond a reasonable doubt either the existence of the disease or defect or its incapacitating effect at the time of the alleged crime.

The trial court disagreed, concluding that it was constitutionally permissible to place the burden of proving diminished capacity on the defendant. It charged the jury in pertinent part as follows:

> In connection with the question of the defendant's mental state at the time in question, since the defendant has raised this defense, that is, the defense that *he had a mental disease or defect at that time which prevented him from having the state of mind the law says he would have to have*, that is, a knowing or purposeful mental state in connection with the killing, he has the burden to prove that he had *such* mental defect or disease by a preponderance of the evidence.

App. at 210 (emphasis supplied). The jurors returned a verdict convicting Humanik of purposeful and knowing murder. App. at 8.

Humanik appealed his conviction to the New Jersey Superior Court, Appellate Division, arguing *inter alia* that the trial court erred in its burden of proof instruction. The court upheld the conviction. It reasoned that requiring Humanik to establish the defense by a preponderance of the evidence did not implicate the prohibition against *ex post facto* laws because, "[a]lthough N.J.S.A. 2C:4-2 was originally silent with respect to the burden of proving mental impairment, the amendment did not change the law in that respect." *State v. Humanik*, 489 A.2d 691, 702 (N.J.Super.App.Div., 1985). The court also rejected Humanik's due process challenge, holding that "the legislature can constitutionally compel the defense to rebut the assumption of mental normalcy as long as the prosecution bears the burden of establishing the requisite state of criminal culpability beyond a reasonable doubt...the trial judge's instructions clearly apprised the jury of the State's obligation in that regard." *Id.* at 699-700. By order dated May 16, 1985, the Supreme Court of New Jersey denied certification, thus exhausting Humanik's state remedies.

On November 14, 1985, Humanik petitioned the district court for a writ of habeas corpus. That court found no constitutional violation in the state court proceedings, reasoning that even if placing the burden of proof on the defendant violated the *ex post facto* clause, any error in this regard had to be considered harmless beyond a reasonable doubt on the entire record. Furthermore, it concluded that the state's burden of proving each element of the crime charged was not shifted to the defendant in this case.

This court granted Humanik's request for a certificate of probable cause to appeal. Our standard of review of a district court's conclusions of law with respect to a state prisoner's petition for a writ of habeas corpus is plenary. *See, e.g., Carter v. Rafferty*, 826

F.2d 1299, 1304 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3460 (U.S. Jan. 11, 1988).

II.

Humanik presses both his due process and *ex post facto* claims in this appeal. We turn first to the *ex post facto* issue. If the 1981 amendment to § 2C:4-2 cannot constitutionally be applied to Humanik's case, it would be unnecessary for us to address the constitutionality of the statute as amended. We conclude, however, that application of the amendment in Humanik's trial was consistent with the *ex post facto* clause.

The United States Supreme Court has repeatedly declared that, in a federal habeas proceeding such as this, "state courts are the ultimate expositors of state law...and we are bound by their constructions except in rare circumstances." *Mullaney v. Wilber*, 421 U.S. 684, 691, 95 S.Ct 1881, 44 L.Ed.2d 508 (1975). In this case, the Appellate Division of the New Jersey Superior Court, *State v. Humanik*, 199 N.J. Super. 284, 489 A.2d 691 (N.J.Super.App. Div. 1985), concluded that the 1981 statutory amendment to § 2C:4-2 did not change existing law relative to the defendant's burden of proving mental disease or defect. That conclusion is a reasonable one based on the preexisting case law and, accordingly, we hold that it is dispositive of the *ex post facto* issue.

In reaching its decision, the Appellate Division relied principally on the New Jersey Supreme Court precedent of *State v. Molnar*, 81 N.J. 475, 410 A.2d 37 (1980), which was decided well before the alleged crime was committed in this case. The court read *Molnar* to hold that under New Jersey law a defendant who contended that a mental defect deprived him of the capacity to have the state of mind necessary for commission of the offense was required "to prove the existence of a mental defect, there amnesia, by a

preponderance of the evidence." *id.* at 701-702, even though the state retained the burden of proving the required state of mind beyond a reasonable doubt. The Appellate Division further construed *Molnar* as upholding the constitutionality of this practice. We find this understanding of *Molnar* to be a reasonable one. Indeed, we believe *Molnar* can only be read as announcing a rule of law consistent with the New Jersey Supreme Court's interpretation of § 2C:4-2 as amended in 1981. Since the addition of the final sentence of that section did not alter the law regarding allocation of the burden of proof as it existed at the date of the alleged crime, the trial court's invocation of the statute did not violate the *ex post facto* clause of the Constitution.

III.

We now turn to the more difficult, due process issue. In order to resolve it, we must briefly review the seminal Supreme Court precedents which address the constitutionality of requiring the accused to bear the burden of persuasion with respect to affirmative defenses. We must also review the New Jersey case law interpreting the diminished capacity statute at issue here.

A.

In *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed 2d 323 (1970), the Supreme Court addressed the constitutionality of a provision of the New York Family Court Act which allowed a juvenile to be declared a juvenile delinquent based upo.. a preponderance of the evidence presented. A juvenile delinquent was defined as a juvenile who did an act which, if done by an adult, would constitute a crime. The Supreme Court declared that "the Due Process Clause of the Fourteenth Amendment protects the accused against conviction

except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. In the words of Justice Harlan, this conclusion was "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring). *See also Speiser v Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)("There is always in litigation a margin of error...Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden...of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.")

In *Mullaney v. Wilber*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the Court applied the *Winship* principle in the context of an affirmative defense. At issue in *Mullaney* was a Maine rule that required a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" for the homicide to be reduced to manslaughter. 421 U.S. at 686. Under the law of Maine, murder was defined as the unlawful killing of a human being "with malice aforethought, either express or implied." *Id.* The state was required to prove that the homicide was unlawful and intentional beyond a reasonable doubt in order to convict the defendant of either murder or manslaughter. Nevertheless, the jury was instructed that "if the state proved the homicide was intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.*

The Supreme Court held that Maine's presumption unconstitutionally shifted to the defendant the burden of proving an element of the crime charged. The Court recognized that, by requiring the defendant "to prove the critical fact in dispute," *id.* at 701, the Maine rule afforded criminal defendants even less protection than the statute at issue in *Winship*; in *Winship* "the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence," *id.*, whereas Maine's rule affirmatively shifted the burden of proof to the defendant, thus "increase[ing] further the likelihood of an erroneous murder conviction." *Id.* at 701.

In a concurring opinion, Justice Rehnquist expressed his belief that the Court's earlier decision in *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), upholding a statute which placed the burden of proving insanity on the defendant, remained good law after *Mullaney*. He reasoned that, "although...evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Id.* at 705-706 (Rehnquist, J., concurring).

Two years later, in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d. 281 (1977), a majority of the Court adopted Justice Rehnquist's reasoning. *Patterson* involved the affirmative defense of extreme emotional disturbance which, like the defense at issue in *Mullaney*, would reduce the crime of second-degree murder to manslaughter if proved by the accused by a preponderance of the evidence. Despite the factual similarity with *Mullaney*, the Court held that requiring the defendant to prove extreme emotional

disturbance was constitutionally permissible because the defense in *Patterson*, unlike in *Mullaney*, did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder. [Rather, it] constitutes a separate issue on which the defendant is required to carry the burden of persuasion." 432 U.S. at 207. The Court, thus, refused to read *Mullaney* broadly, declaring:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused...We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required; we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

*Id.* at 210.

Most recently, in *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), the Court relied on its reasoning in *Patterson* to sustain an Ohio statute that placed the burden of proving self-defense by a preponderance of the evidence on the accused. The Court reviewed the elements necessary to establish self-defense under Ohio law and found none of these facts present in the definition of the crime of murder for which the defendant had been charged. On that basis, the Court rejected the defendant's due process argument, and reaffirmed the line drawn in *Patterson* with respect to the constitutionality of shifting to the

defendant the burden of proving facts that are not elements of the crime charged:

> The State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation and design. It did not seek to shift to Martin the burden of proving any of those elements, and the jury's verdict reflects that none of her self-defense evidence raised a reasonable doubt about the state's proof that she purposefully killed with prior calculation and design.

480 U.S. at 233.

The Supreme Court emphasized in *Martin*, however, that where there is evidence relevant both to an element of the offense charged and to an affirmative defense, the jury must be instructed that the defendant's evidence on the affirmative defense must be considered in determining whether the state has proved all the elements of the offense regardless of whether the defendant has carried his burden of proof with respect to the affirmative defense. The court cautioned:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the state's case, i.e., that self-defense must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the state of its burden and plainly run afoul of *Winship*'s mandate.
>
> The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to

> self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the state's proof of the elements of the crime.

480 U.S. at 233-34.

B.

We now turn to New Jersey's diminished capacity statute, N.J.Stat.Ann § 2C:4-2. The meaning, scope and constitutionality of § 2C:4-2, have been addressed in two recent New Jersey Supreme Court cases, *State v. Breakiron*, 108 N.J. 591, 532 A.2d 199 (1987), and *State v. Zola*, 112 N.J. 384, 548 A.2d 1022 (1988), both decided after the completion of Humanik's state court proceedings.

In *Breakiron*, the Court, after a comprehensive review of the genesis and history of the statute, concluded that it deals only with evidence of mental disease or defect offered to show that the defendant did not have the mental state required by the statute defining the crime charged; it thus has nothing to do with evidence offered in support of an insanity defense or any other defense tending to show a justification or excuse for conduct that violates the statute at issue. As the Court observed:

> We believe that the diminished capacity defense was designed by the Legislature not as a justification or an excuse, nor as a matter of diminished or partial *responsibility*, but as a factor bearing on the presence or absence of an essential element of the crime as designated by the Code.

532 A.2d at 208 (emphasis in original).

The *Breakiron* court found no *Winship* problem, however, because it construed the statute as imposing upon the defendant *only* the burden of proving the

existence of a "relevant" mental disease or defect, one that is *capable* of depriving a person of the capacity to achieve the required state of mind. According to the Court, the statute did not impose any burden of persuasion upon the defendant with respect to the distinct issue of whether a mental disease or defect had in fact deprived the defendant of such capacity at the time of the alleged offense. Since the defendant's statutory burden was on an issue distinct from the issue posed by the element of the crime charged, the *Breakiron* Court, relying on cases permitting the burden of proving insanity to be placed on the defendant, found no constitutional infirmity. Thus, it concluded:

> As long as the State remains responsible to prove beyond a reasonable doubt the essential elements of an offense, the Supreme Court has held that it is constitutionally permissible to impose on a defendant the burden of proving an insanity defense that exculpates the defendant. *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). . . . Whether or not mental disease or defect is established, the State always bears the burden of proving beyond a reasonable doubt the essential mental elements of the crime charged. But the presence or absence of mental disease or defect is not an essential element of the crime as defined by the Legislature. . . .

*Id.* at 210.

In *Zola*, the New Jersey Supreme Court again recognized that *Winship* would be violated by a statute or charge suggesting that the defendant had the burden of proof in connection with an issue that the state was required to prove as an element of the offense:

> In *Breakiron*, we upheld the constitutionality of the "diminished capacity" statute, N.J.S.A. 2C:4-2, to the extent that it imposes on a defendant the burden of proving the presence of *a mental disease or defect that has the capacity of negating the culpable mental state that is an essential element of the offense charged....* At the same time, we emphasized that the statute intends no more than it states -- i.e., that the defendant need show only that the condition was *present*, not that it in fact negated the culpable mental state. To do otherwise would impermissibly shift to the defendant the burden of disproving an essential element of an offense.

548 A.2d at 1029-1030 (emphasis added). As in *Breakiron*, the Court here found no constitutional problem with the diminished capacity defense because the burden imposed by the statute was on an issue distinct from that which the State was required to prove.

The Court went further in *Zola*, however, and undertook to give concrete guidance to the trial courts of New Jersey concerning the jury instruction to be thereafter given in homicide cases:

> We recognize the continuing debate on the best manner of conveying the diminished capacity defense to the jury. *See* 121 *N.J.L.J.* 453 (March 10, 1988). We believe that the jury's understanding of this offense would be advanced by the suggestion offered before us in the Public Defender's brief. He proposed that in order to meet the constitutional requirement, the court should instruct the jury in words similar to these:
>
> > The defendant must prove by a preponderance of the evidence that he suffers from a mental

> disease or defect. However, the prosecution must prove beyond a reasonable doubt that defendant's mental disease or defect did not negate the state of mind which is an element of the crime, that is, purposely or knowingly. In other words, the prosecution must prove beyond a reasonable doubt that defendant acted purposely or knowingly despite his mental disease.

*Id.* at 1031.

C.

When one attempts to apply *Winship* and its progeny in the context of New Jersey's diminished capacity statute, it is helpful to distinguish three different situations. First there is the situation like that confronted in *Patterson* and *Martin* in which the ultimate issues posed by one of the elements of the offense and by an "affirmative defense" are different, but nevertheless are such that subsidiary facts are relevant to both issues. This situation typically involves defenses such as insanity and self-defense which excuse or justify the commission of an offense. In such a situation, a state may place the burden of proof on the defendant with respect to the ultimate issue posed by the "affirmative defense." Nevertheless, the charge to the jury must make it clear that the jury can consider the defendants' evidence as it relates to the "element of the crime" issue, which the government has the burden of proof beyond reasonable doubt, regardless of whether the jury believes the defendants' evidence more likely true than not true. Otherwise, a conviction would violate the *Winship* rule that a defendant who creates a reasonable doubt about an element of the offense charged is entitled to an acquittal. The Supreme Court explained this in *Martin*. While it permitted Ohio to place on the

defendant the burden of proving the affirmative defense of self-defense by a preponderance of the evidence, it did so only because the instructions as a whole made it clear that all evidence relevant to the "element of the crime" issue had to be considered by the jury in reaching a decision on whether that element had been proved by the state beyond a reasonable doubt.

A different and more serious problem is presented in the situation where the element of the offense and the so-called "affirmative defense" pose the same ultimate issue and a state places the burden of persuasion on the defendant with respect to that ultimate issue. In such a situation, the relevance of the subsidiary facts in the case are the same and the sole significance of the defendants' evidence concerning the so-called "affirmative defense" is to create a reasonable doubt about the existence of an element of the offense. In this context, as the Supreme Court of New Jersey recognized in both *Breakiron* and *Zola*, it is not constitutionally permissible under *Winship* and *Martin* to charge the jury that the defendant has the burden of proving his defense by a preponderance of the evidence. As we recently observed in *United States v. Clemons*, 843 F.2d 741, 752 (3d Cir. 1988):

> Merely labelling something an affirmative defense does not mean the statute is constitutional. "[i]t must appear that the so-called defense does not in actuality negate any element of the crime." 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.8, at 75 (1986); *see generally Sandstrom*, 442 U.S. at 520, 99 S.Ct. at 2457. A defendant may be required to bear the burden of persuasion with respect to defenses such as those showing justification or excuse, but not with respect to those that "negative guilt by cancelling out the existence of some required element of the

crime." W.LaFave & A.Scott, *supra*, at 71, 75. Accordingly, in assessing the constitutionality of an affirmative defense, we must inquire whether "the defense is defined in terms of a fact so central to the nature of the offense that, in effect, the prosecution has been freed of the burden" of establishing each constituent element of the crime charged beyond a reasonable doubt. *See id.* § 2.13, at 233; *accord In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1072-73 (prosecution must prove beyond a reasonable doubt every fact necessary to constitute the charged crime.)

In this kind of situation, the constitutional problem is not eliminated by including an instruction in the charge that the state has the ultimate burden of proving every element of the offense beyond a reasonable doubt. When such a standard instruction is coupled with one placing a burden on the defendant to prove his defense by a preponderance of the evidence, the predictable result is more than merely confusion. In order to attribute some significance to the defendants' burden, a rational juror's only option is to conclude that the defendants' evidence concerning the subject matter of the "affirmative defense" is to be considered only if the jury finds it persuasive, i.e., finds that the facts sought to be proved are more likely true than not true. It is clear from *Martin* that this is constitutionally impermissible.

There is still a third situation illustrated by *Breakiron* and *Zola*. The ultimate issue posed by a diminished capacity defense and the ultimate issue posed by the state of mind element of the offense charged are identical. The New Jersey Supreme Court, however, has interpreted the diminished capacity statute to mean that the defendants' burden of proof by a preponderance of the evidence goes only to the subsidiary issue of whether the defendant had a

mental disease or defect of a kind that can deprive a person of the ability to form the requisite state of mind. Nevertheless, the only relevance of that fact is that it is probative with respect to the ultimate issue posed by the state of mind element of the offense charged, i.e., whether the requisite purpose or intent was present at the time of the crime. Thus, in this case, for example, Humanik's expert medical testimony tended to show that he had a disease or defect of the requisite kind but the sole relevance of that fact was whether or not such a disease or defect in fact deprived him of the capacity to formulate intent and purpose on the particular occasion in question. If Humanik did not have such a mental disease or defect, for example, it would follow that such a defect did not deprive him of the capacity to formulate an intent to kill on the day of the shooting. Any charge to be given in a case such as Humanik's must be evaluated with a sensitivity to this dependent relationship between the two factual issues found to be distinct in *Breakiron* and *Zola*, and we believe this relationship distinguishes this case from those, like the insanity defense cases, relied upon by the New Jersey Supreme Court.

D.

With this background we turn to the issue of whether the trial court's instruction to the jury in Humanik's trial was consistent with his rights under the due process clause. As we have earlier noted, the trial judge did not yet have the benefit of *Breakiron* and *Zola*. In the absence of such guidance, his instructions to the jury made no attempt to draw a distinction between the subsidiary issue of whether Humanik had a relevant mental disease or defect and the ultimate issue of whether that disease or defect resulted in his having no intent to kill Ms. Guzzo. Rather, as reflected in our previous quote from these instructions, the trial

judge expressly told the jury that Humanik had the burden of proving by a preponderance of the evidence that he "had a mental disease or defect at that time [i.e., the time of the alleged crime] which prevented him from having the state of mind the law says he would have to have, that is, a knowing or purposeful mental state in connection with the killing." App. at 210.

We agree with the respondent that a single portion of a charge must not be evaluated in artificial isolation, but rather that the instructions must be viewed in the context of the overall message conveyed to the jury. *See, e.g., Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 408 (1973). Nevertheless, there is nothing else in the charge that in any way dilutes this express instruction that Humanik had the burden of proving by a preponderance of the evidence that he had a mental disease or defect that negated the existence of an intent to kill Ms. Guzzo.

The only portions of the charge relied upon by the respondents are those portions referring to the state's burden of proving each element of the crime charged beyond a reasonable doubt.[2] It is true that these portions of the instructions when applied in the

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2. The state of New Jersey also contends that the jury charge in this case was fully consistent with due process in that, unlike *Mullaney*, no essential element of the crime of murder was presumed; the state put forth competent evidence to show that Humanik had the requisite intent to kill and did not rely upon a presumption that the defendant was called upon to rebut. The principles of *Winship* and *Mullaney*, however, are plainly not confined solely to the factual circumstance of where the state *presumes* an essential element of the offense. If this were so, the Court's detailed analysis in both *Patterson* and *Martin* would have been unnecessary inasmuch as neither case involved a challenged presumption per se. An inquiry as to whether or not there is a presumption that impermissibly shifted the burden of proof to the defendant is unnecessary when the judge's charge expressly directs such a shift.

context of the evidence regarding mental disease or defect and intent directly contradict the court's instruction on the diminished capacity defense. A charge that contradicts a constitutionally impermissible instruction does not cure the problem, however, when there is a reasonable likelihood that a juror may have understood the charge as conveying an unconstitutional message. In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985), the Supreme Court reasoned, after finding an unconstitutional presumption in the trial court's charge to the jury, that a presumption of innocence "boilerplate" instruction did not cure the due process violation:

> The Court today holds that contradictory instructions as to intent -- one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion--create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility. If such a reasonable possibility of an unconstitutional understanding exists, we "have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction." *Sandstrom*, 442 U.S., at 526. For this reason, it has been settled law since *Stromberg v. California*, 283 U.S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside.

*Id.* at 323 n.7.

We conclude that there is more than a reasonable likelihood that the jurors in Humanik's case received

an unconstitutional understanding of their task. First, we believe it far more likely that the jurors when considering the evidence regarding mental disease or defect applied the instruction specifically directed to that subject matter rather than the more general charge. More important, as we have earlier suggested, a rational juror attempting to attribute some significance to the instruction on the diminished capacity defense would necessarily conclude that the defendant's evidence should be considered on the intent issue only if the juror finds it to be more likely true than not true. As *Martin* explains, this would be fundamentally at odds with the teaching of *Winship* that a defendant whose evidence raises even a reasonable doubt about an element of the offense charged must be acquitted.

We thus are constrained to disagree with the respondent's contention that the charge, read as a whole, accurately anticipated the teachings of *Breakiron* and *Zola*. Even were we to agree with that contention, however, we would nevertheless be unable to uphold Humanik's conviction. The problem, as we see it, is inherent in the statute even as it has been construed in *Breakiron* and *Zola*. We think this can best be illustrated by an analysis of the effect of the jury instruction expressly approved in *Zola*.

The instruction approved in *Zola* clearly distinguishes between the subsidiary issue of whether the defendant suffers from a disease or defect and the ultimate issue of intent and the effect of any disease or defect thereon. It teaches that the defendant has the burden of persuasion only with respect to the former and that the state has the burden of persuasion with respect to the latter. In any case in which the jury finds it more likely than not that the defendant suffers from a mental disease or defect, we believe this charge provides adequate assurance that the remainder of the jury's deliberations will be consistent with due process.

The problem we perceive lies in the fact that a reviewing court will rarely be able to determine whether a jury which convicted the defendant found it more likely than not that he suffered from a relevant mental disease or defect. In the absence of such knowledge, it can only assume that the jury may have concluded that the defendant failed to carry his burden of proof on the issue. In such circumstances, we conclude that the *Zola* charge provides inadequate protection against a due process violation.

In our view, the *Zola* charge invites the jury to address first the subsidiary issue of whether the defendant suffered from a mental disease or defect of the requisite kind.[3] If a jury does so and concludes that the defendant has not met his burden of proof by a

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3. This distinguishes a case involving the charge approved in *Zola* from the situation before this court in *United States ex rel. Goddard v. Vaugh*, 614 F.2d 929 (3d Cir. 1980). *Vaugh* involved a Delaware trial court's instruction in a homicide case that the defendant had the burden of proving an intoxication defense by a preponderance of the evidence. This court concluded that because of the order in which the jury was instructed to address the issues, there was no likelihood of the jury having considered less than all of the defendant's evidence in determining whether the State had proved intent beyond a reasonable doubt:

> Only after determining that the prosecution had established its case on first degree murder did the jury have occasion to consider whether the intoxication had been established. This affirmative defense therefore did not lessen the state's burden but added a separate element to the trial so that the defendant would have an opportunity for mitigation.

*Id.* at 935.

To the extent that portions of the opinion in *Vaugh* can be read to suggest that a charge may properly place a burden of proof on the defendant with respect to an issue identical to the issue raised by an element of the offense charged, we conclude that any such suggestion cannot survive the analysis of the Supreme Court in *Martin*, as we tacitly recognized last year in our *Clemons* decision.

preponderance of the evidence, we think there are only two possible meanings that jurors could draw from the proposed instruction. They could conclude either that they should assume that such a disease or defect does not exist or that the diminished capacity issue has been dropped from the case. In either event, when the jury reaches the state of mind issue on which the state has the burden of proof beyond a reasonable doubt, the defendant's evidence concerning the existence of a disease or defect will play no role in their decision. Thus, we believe the proposed charge would have precisely the same effect as the hypothetical charge condemned in *Martin*. As with self-defense evidence, a jury may not be told in this context that the mental disease or defect "evidence must be put aside . . . unless it satisfied the preponderance standard." 480 U.S. at 233-34. If the defendant's evidence on mental disease or defect is sufficient to raise a reasonable doubt about the existence of the requisite intent, it cannot constitutionally be ignored. If a defendant's evidence creates a reasonable doubt about any element of the offense charged, he must be acquitted.

We stress that *Breakiron* and *Zola* do more than declare that before a jury issue can arise with respect to the existence of a mental disease or defect and the absence of the requisite state of mind as a result thereof, a defendant must come forward with evidence about the existence of such a disease or defect which a reasonable juror could credit. We have no doubt that such a requirement is constitutionally permissible. But in the situation before us, there is no dispute that the defendant has come forward with such evidence. The issue posed by the *Zola* approved charge is whether a state may impose a "preponderance of the evidence" filter which may bar consideration of that evidence by the jury in determining whether the state has proved the requisite state of mind beyond a reasonable doubt. We hold that it may not.

IV.

Based on the foregoing analysis, we will reverse the judgment of the district court and remand with instructions to enter a judgment in Humanik's favor requiring the State of New Jersey to release him unless he is retried and convicted within a reasonable period.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE THIRD CIRCUIT

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**No. 88-5098**

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JOHN MICHAEL HUMANIK, JR.,

*Appellant*

vs.

HOWARD BEYER, WARDEN

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 22, 1989.

/s/ Walter K. Stapleton
Circuit Judge

Dated: APR 21 1989

## APPENDIX C

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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**Civil No. 85-5455(GEB)**

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JOHN MICHAEL HUMANIK, JR.,

*Petitioner,*

vs.

HOWARD BEYER, et als.,

*Respondents.*

ORIGINAL FILED
DEC 30 1987
WILLIAM T. WALSH, CLERK

**OPINION**

**BROWN, District Judge**

Petitioner, John Michael Humanik, Jr. presently confined in Trenton State Prison, seeks a writ of habeas corpus from this Court pursuant to 28 U.S.C. § 2254. Humanik was found guilty of murdering his former girlfriend and attacks the legality of his confinement on the grounds that: 1) he was denied due process because his constitutional right to a presumption of innocence until the State had proven every element of the crime charged beyond a reasonable doubt was vitiated by the jury instructions; and 2) retroactive application of amended N.J.S.A. 2C:4-2, placed the burden of proof of diminished capacity by a preponderance of the evidence on the defendant, violating the *ex post facto* prohibition of the Constitution. Art. I, §9, cl. 3 and Art. I, §10, cl. 1.

The Honorable Freda L. Wolfson, United States Magistrate, filed a report and recomnmendation in this case. The Magistrate first determined that the petitioner was not denied his constitutional right of presumption of innocence and, therefore, was not entitled to a writ of habeas corpus on these grounds. The Magistrate then determined that the retroactive application of amended N.J.S.A. 2C:4-2 constituted a violation of the *ex post facto* clause which was grounds for issuance of a writ. Objections to the Magistrate's report and recommendation were filed by the petitioner as to the grounds cited for denial of the writ, and by the State as to the grounds cited for issuance of the writ.

This Court has conducted an independent review of the petition for the writ, the answer of the respondent, the report and recommendation of the Magistrate and the objections of the petitioner and the respondent.

I. The petitioner contends that Magistrate Wolfson misinterpreted the holding of the United States Supreme Court in *Patterson v. New York*, 432 U.S. 197 (1977), as it should have been applied in this case. In *Patterson* the Supreme Court held that the New York law requiring a defendant in a prosecution for second-degree murder to prove the affirmative defense of extreme emotional disturbance by a preponderance of evidence did not violate the Due Process Clause. The Court determined that the prosecution was not constitutionally required to prove the "nonexistence of all affirmative defenses." *Id.* at 210. *Patterson* was recently re-affirmed by the Supreme Court in *Martin v. Ohio*, 107 S.Ct. 1098 (1987) (it is not a violation of the Due Process Clause for a state to place the burden of proving self defense on the defendant.) The petitioner also relies upon *Wilson v. Tard*, 593 F.Supp. 1091 (D.N.J. 1984), in which the Court found that, in shifting the burden of proof to petitioner to establish a defense of mistake, the state trial court improperly shifted to the petitioner the burden

of disproving a material element of the offense. *Id.* at 1095

The petitioner in *Wilson* was found guilty of aggravated manslaughter. At trial, the petitioner was given the burden of proving the defense of mistake of fact. In order to prevail on this defense, the petitioner had to prove that he had reasonably believed that the gun he used was unloaded when he pulled the trigger.

The reviewing Court determined that in New Jersey, "manslaughter requires that the accused have committed a homicide 'recklessly.' " Id. at 1096 (citation omitted). Under the statute, when a person acts recklessly, "he consciously disregards a substantial and unjustifiable risk." *Id.* Thus, the Court determined that "one acts recklessly when he acts unreasonably and while aware that he is ignoring an obvious danger." *Id.* at 1096. In issuing the writ, the Court concluded that "under New Jersey law recklessness and mistake of fact have a mirror relationship. . . they are two inconsistent things; thus by proving the latter, the defendant would negate the former[.]" *Id.* quoting *Mullaney v. Wilbur*, 421 U.S. 684, 686-87 (1985)

The circumstances raised in *Wilson* are not present in Humanik's case. In *Wilson*, an element of the offense was presumed unless the defendant produced evidence otherwise. In this case, in the absence of evidence presented by the defendant in support of a diminished capacity claim, no element of the substantive offense was presumed. Instead, without evidence the presumption is that the defendant did not have a mental disease or defect which would negate the state of mind element of the offense. Thus, the State's burden was not altered. The affirmative defense did not negate any facts of the crime which the State had the burden of proving. The State was required to carry the burden of proof as to each element of the offense charged and the trial court properly instructed the jury on the burden of proof:

> Mr. Humanik has been presumed innocent from the moment he was charged throughout the trial, as I spoke to you now, and even as you enter into that jury room and consider of the charge as set forth in the indictment. That is unquestioned. And it is the burden that the State has to prove his guilt beyond a reasonable doubt. . .
>
> x x x
>
> [T]he burden of proving the defendant's guilt rests heavily on the State and it never shifts back to the defendant. Mr. Humanik has had no duty or obligation to prove that he's innocent in the sense that we say that the State must prove his guilt.

8T:118-119

Under *Patterson*, this jury instruction is proper because the State must prove the elements of the offense. The State may require the defendant to prove the affirmative defense after the State has met its burden. *Martin*, 107 S.Ct. at 1103.

The New Jersey Supreme Court recently analyzed the defense of diminished capacity and held:

> Defendant argues that N.J.S.A. 2C:4-2 impermissibly shifts to him the burden of disproving and essential element of the crime by denoting the diminished capacity defense as an affirmative one that defendant must prove. He contends that since evidence of mental disease or defect is not to be received in support of a basic affirmative defense, i.e., a justification or excuse for conduct that would otherwise be criminal, but instead is used to create a reasonable doubt concerning an essential element of the offense with which he was charged, the State, not the defendant, must bear the burden of proof on such an issue.

> We believe that this argument flows from a continued misunderstanding of the exact components of a diminished capacity defense. We agree with the view expressed in *State v. Humanik, supra*, at 294-95, that
>
> > "the defense of diminished capacity is not designed to defeat a case the State has otherwise established. Rather, the term is a legal colloquialism referring to psychiatric or other evidence contesting the State's thesis that the accused acted with the mental state required to be proven in order to convict."
>
> x x x
>
> Hence, when the Code says that mental disease or defect is an affirmative defense that must be proven by a preponderance of the evidence, it does not mean that the defendant must disprove that the act was knowing or purposeful. It means only what it says, that the defendant must show that he or she suffered from a mental disease or defect that is relevant to the mental state of the offense.

*State v. Breakiron*, slip op. at 27-28 (October 29, 1987).

In *Molnar*, decided one year before the commission of the crime in Humanik, the New Jersey Supreme Court upheld placing on the defendant the burden of proving the defense of amnesia by a preponderance of the evidence. In considering Humanik's case, the Appellate Division of the New Jersey Superior Court determined that *Molnar* established the law in New Jersey concerning burden of proof of the existence of mental disease or defect, applied that decision to the defense of impaired capacity raised by Humanik.

This Court's authority to review state court jury instructions is narrow. State courts are the ultimate expos-

itors of state law, and the federal courts are bound by their interpretations, except in extreme circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). A state court conviction may only be set aside by a federal court considering a habeas corpus petition if the jury instruction given "renders the subsequent conviction violative of the United States Constitution." *Splawn v. California*, 431 U.S. 595, 599 (1977). Where the issue in contention turns upon a proper reading of the state court decisions, a determination by the state's highest court is entitled to great weight in evaluating the petitioner's constitutional contentions. *Id.* at 600.

The New Jersey Supreme Court in *State v. Molnar*, *supra*, held that it was "appropriate to impose the burden of proof regarding the defense of amnesia upon the defendant by a preponderance of the evidence." *Id.* at 492. As quoted below, the *Molnar* Court was particularly concerned with the peculiar nature of the amnesia defense:

> Such a defense, dependent on the vagaries of both human memory and our knowledge of its mechanism, can be easily fabricated after the commission of a criminal act. If the burden of proof were not placed on the defendant, perjury trials would be a particularly fertile field for the abuse of the amnesia defense, especially in light of the recognition that "amnesia is present in some degree in everyone. . ." (citations omitted).

*Id.* at 492.

The *Molnar* Court expressly declined to decide whether amnesia was actually intended by the Legislature to fall within the provisions of N.J.S.A. 2C:4-2, the statute in issue in this case. *Id.* at 491 n.6.

The *Humanik* Court read *Molnar* to hold that it was constitutionally permissible to require the defendant to prove the existence of *any* mental defect by a preponder-

ance of the evidence. 199 N.J. Super at 303. This reading is inconsistent with the language in *Molnar* limiting the holding to the defense of amnesia.

However, this Court agrees with the recent New Jersey Supreme Court holding that it is constitutionally permissible to impose the burden of proving diminished capacity on the defendant. *See State v. Breakiron*, slip op. (October 29, 1987). Proving diminished capacity does not mean that the defendant has to disprove the act was knowing or purposeful. *See id.* at 27-28.

Because there is no shift in the burden of proving the elements of the offense, there is no due process violation. Petitioner's petition for writ of habeas corpus on this basis must be denied.

II. Respondents object to the Magistrate's recommendation for issuance of a writ of habeas corpus on the second ground, i.e. that retroactive application of N.J.S.A. 2C:4-2, as amended, violated the *ex post facto* clause of the Constitution. As originally enacted, and as in effect at the time of the crime for which Humanik was charged, N.J.S.A. 2C:4-2 provided for the admissibility of evidence of a mental disease or defect when relevant to negate the requisite culpable state of mind. In the absence of such evidence, there was a statutory presumption that no such condition existed. As amended, the statute provides that "[m]ental disease or defect is an affirmative defense which must be proven by a preponderance of the evidence".[1]

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[1] Compare the original statute, with the amended version:

2C:4-2. *Evidence of mental disease or defect admissible when relevant to element of the offense.*

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease

"[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective. . . and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnotes omitted). No *ex post facto* violation occurs if the change is procedural and does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 (1884), as quoted in *Weaver, supra*, 450 U.S. at 29 n. 12.

The respondents raise three grounds of objection. First, respondents contend that it was erroneous and improper to not recognize "that the state court's interpretation of the criminal law of New Jersey is binding upon a federal habeas court." Second, the respondents contend that even if N.J.S.A. 2C:4-2, as amended, was a change in the law, "the *ex post facto* clause was not necessarily violated and the report's reliance upon *United States v. Kowal*, 596 F.Supp. 375 (D.Conn. 1984), was misplaced[.]" Third, respondents contend that any error at the trial level in applying the State statute was harmless error, so recommendation for issuance of a writ was erroneous.

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or defect which would negate a state of mind which is an element of the offense.

The amended statute, with the new language appearing in the last underlined sentence, follows:

2C:4-2. *Evidence of mental disease or defect admissible when relevant to element of the offense.*

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a statement of mind which is an element of the offense. *Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.*

Under New Jersey law, rules governing burden of proof are procedural matters. *State v. Molnar*, 81 N.J. 475, 488 (1980). However, "[a]lteration of a substantial right. . . is not merely procedural, even if the statute takes a seemingly procedural form." *Kowal, supra*, 596 F.Supp. at 377, citing, *Thompson v. Utah*, 170 U.S. 343, 354-55 (1898). Thus, merely styling a change as a procedural one does not necessarily take that change out of the reach of the *ex post facto* clause.

Petitioner, and the Report and Recommendation, rely on federal district court opinions interpreting the Insanity Defense Reform Act of 1984, 18 U.S.C. § 209 ("IDRA") in the context of an *ex post facto* clause challenge. The courts which have thus analyzed IDRA have concluded that the Act violated the *ex post facto* claims if retroactively applied.

*United States v. Kowal*, 596 F.Supp. 375 (D.Conn. 1984), held invalid the retroactive application of the altered burden of proof. In so holding, the Court stated that:

> Application of the newly-enacted burden to this defendant thus runs afoul of the *ex post facto* prohibition. Whether viewed as in effect an alteration of a substantial right, while taking a seemingly procedural form, . . . [citations omitted] or as a procedural change which operates to modify the quantum and kind of proof required to establish guilt or otherwise affects the defendant in a harsh or arbitrary manner, see *Beazell* at 170-71, 46 S.Ct. at 68-69, this defendant cannot constitutionally be required to assume the burden of proving insanity.

*Id.* at 379.

Similarly, the Court in *United States v. Lakey*, 610 F.Supp. 210 (S.D. Tex. 1985) also concluded that IDRA, although procedural in form, would violate the *ex post facto*

clause if applied retroactively. *Id.* at 213. In *United States v. Prickett*, 604 F.Supp. 407 (S.D. Ohio 1985), *aff'd*, 790 F.2d 35 (6th Cir. 1986), the district court found that the *ex post facto* clause would prohibit application of IDRA to a case involving crimes committed prior to the effective date of the statute. This finding was not disturbed by the Sixth Circuit Court. The parties in *United States v. Mest*, 789 F.2d 1069 (4th Cir.), cert. denied 107 S.Ct. 163 (1986) also agreed that the changes brought about by the enactment of IDRA were substantive, and thus IDRA was not applied retroactively by the trial court.

The State urges this Court not to follow *Kowal* which it argues "appears. . . was incorrectly decided." However, this Court need not reach the issue whether *Kowal* was correctly decided, because the issue raised there was vastly different than that presented here.

The *Kowal* Court found:

> Prior to the Act, evidence short of proof of sanity beyond a reasonable doubt would entitle defendant to an acquittal. The Act, *by allocating the burden of proof to defendant*, results in an acquittal by reason of insanity only if insanity is proven clearly and convincingly.
>
> There is a substantial middle ground or "grey area" between government proof of sanity (beyond a reasonable doubt) and clear and convincing proof of insanity. Prior to the Act, if the evidence raised a reasonable doubt as to defendant's sanity or showed him to be possibly insane, he should be acquitted. Under the Act, the same state of the evidence, where his sanity is in doubt or he is possibly but not clearly and convincingly insane, i.e. in the same middle ground, he would not be entitled to an acquittal. The Act thus denies a defendant acquittal if he falls in the middle ground or grey area whereas

the pre-Act law would require acquittal in such circumstances.

– *Kowal*, 596 F.Supp. at 379. Here, by contrast, the burden of proof regarding diminished capacity always rested on the defendant. *See supra* p. 6 n.1 (comparing the original and amended statute).

Moreover, the defense of insanity is not entirely analagous to the defense of diminished capacity. As noted by the New Jersey Supreme Court "insanity does not serve to disprove an essential element of the crime, *but instead serves to excuse totally the conduct of the actor*; it is called a defense because it exculpates the defendant, even if it does not negate any elment of the offense with which the defendant is charged. The diminished capacity principles are different." *Breakiron*, slip op. at 36. (emphasis added). *See also Humanik*, 199 N.J. Super. at 299 n.6.

Furthermore, not all changes in the law which work to the disadvantage of the defendant are *ex post facto*. *See Dobbert v. Florida*, 432 U.S. 282, 293 (1986). In *Dobbert*, the Court held that a change in Florida law altering methods employed in determining whether the death penalty was to be imposed was procedural and not prohibited by the *ex post facto* clause because the crime, punishment prescribed, and quantity or degree of proof necessary to establish guilt all remained unaffected by statute. *Id.* at 293-94. In *Beazell v. Ohio*, 269 U.S. 167 (1925), the Court wrote that "statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense, and which operate only in a limited and unsubstantial manner to his disadvantage," do not implicate the *ex post facto* clause. *Id.* at 170-71.

Even if the *ex post facto* clause were implicated, I would nevertheless be compelled to conclude, based upon a review of the trial record, that any alleged error regarding the application of 2C:4-2 would be harmless. See *Rose v. Clark*, 106 S.Ct. 3101 (1986) (harmless error doctrine ap-

plied in habeas petition). Under the harmless error standard, an otherwise valid conviction should not set aside if the Court may confidently say, on the basis of the entire record, that the constitutional error in question was harmless beyond a reasonable doubt. *Id.* at 3109.

The record below clearly establishes guilt beyond a reasonable doubt. The petitioner embarked on a deliberate, calculated course of conduct, over a period of days, including test firing the murder weapon, purchasing .32 caliber ammunition and a hunting knife. During this time he continued to think or fantasize about killing the decedent. *See, e.g., Humanik*, 199 N.J. Super. at 288-90. The jury heard expert medical testimony, both for and against the defendant, regarding whether defendant was capable of acting knowingly or purposely. The jury was instructed with regard to the elements of murder, aggravated manslaughter, and manslaughter. They were instructed that the State bore the burden of proof beyond a reasonable doubt as to each and every element charged, and with regard to the murder charge, that the State had to prove purpose or knowledge beyond a reasonable doubt. In addition, the defendant's claim of diminished capacity was fully set forth for the jury, and ultimately rejected. The instructions were clear and proper, and defendant was found guilty beyond a reasonable doubt.

It is therefore on this 30th day of December, 1987,

ORDERED that the petition of John Michael Humanik, Jr. for a writ of habeas corpus be and hereby is dismissed.

This Court certifies that there is no probable cause for appeal from this Order. No costs.

/s/ Garrett E. Brown, Jr., U.S.D.J.

## APPENDIX D

## UNITED STATES DISTRICT COURT
## DISTRICT OF NEW JERSEY

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**Civil Action No. 85-5455**

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JOHN MICHAEL HUMANIK, JR.

*Petitioner,*

v.

HOWARD BEYER, ET ALS.,

*Respondents.*

ORIGINAL FILED
OCT 27 1986
WILLIAM T. WALSH, CLERK

### REPORT AND RECOMMENDATION

Petitioner, John M. Humanik, Jr., presently confined in Trenton State Prison, seeks a writ of habeas corpus from this court pursuant to 28 U.S.C. §2254. Petitioner is serving a life sentence, without possibility of parole for 25 years, for his conviction of murder, contrary to N.J.S.A. 2C:11-3. He claims two bases for relief: 1) that he was denied due process in that his constitutional right to be presumed innocent until the State had proven every element of the crime charged beyond a reasonable doubt was vitiated by the jury instruction at his trial; and 2) retroactive application of amended N.J.S.A. 2C:4-2, placing the burden of proof of diminished capacity by a preponderance of the evidence on the defendant, was a violation of the *ex post facto* prohibition of the Constitution. Art. I, §9, cl.3 and Art. I, §10, cl.1.

**Procedural History**

Petitioner was charged with the August 11, 1981 murder of his girlfriend. He was tried in the Superior Court of New Jersey, Law Division, before a jury, the Honorable Mark Addison, J.S.C., presiding, the last week of March, 1982. The jury returned a verdict of guilty on April 1, 1982. On June 4, 1982 he was sentenced to life imprisonment, with a minimum 25 year term before parole, and fined $10,000, payable to the Violent Crimes Compensation Board. After his motion for a new trial was denied, petitioner filed a notice of appeal on July 22, 1982. In a reported opinion dated February 6, 1985, the New Jersey Superior Court, Appellate Division affirmed the conviction. 199 N.J. Super. 283. The New Jersey Supreme Court denied a petition to grant certification on May 16, 1985. The present petition was filed November 12, 1985.

**The Merits**

Since petitioner raised the issues in his state proceedings that he brings before us, he has satisfied the requirements of exhausting state remedies prior to petitioning for habeas relief. 28 U.S.C. §2254(b). His first claim is that the jury instruction at his trial impermissibly shifted the burden of proof to him, contrary to the due process requirement that the State must prove every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). The pertinent part of Judge Addison's jury charge, relating to petitioner's due process claim, dealt with the defense of mental disease or defect:

> In connection with the question of the defendant's mental state at the time in question, since the defendant has raised this defense, that is, the defense that he had a mental disease or defect at that time which prevented him from having the state of mind the law says he would have to have, this is a knowing or purposeful mental state in connection with the kill-

> ing, he has the burden to prove that he had such mental defect or disease by a preponderance of the evidence.

8T131. This charge applied the law of New Jersey on the affirmative defense of mental disease or defect, wherein the defendant bears the burden of proving such mental disease or defect by a preponderance of the evidence. N.J.S.A. 2C:4-2.[1] Since we find that the trial judge fairly applied the statute in charging the jury we will evaluate the claim that the statute violates the due process clause of the Constitution.

Two rulings of the United States Supreme Court provide us with guidance in the present case. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the rule of *Winship, supra*, was applied so as to strike as unconstitutional a Maine statute which required a homicide defendant to prove by a preponderance of the evidence the defense of heat of passion or sudden provocation, which would reduce the offense from murder to manslaughter. The Court held that placing this burden on the defendant amounted to shifting the burden of proof of an element of the crime from the State to the defendant. *Mullaney, supra*, at 686-87. Were *Mullaney* the latest pronouncement on this issue our review of the challenged statute would likely be similar to the position of the Supreme Court of Oregon in *State v. Stockett*, 278 Or. 637, 566 P.2d 739 (1977), which invalidated an Oregon statute that required a defendant to prove the affirmative defense of mental disease or defect.

But it was settled, in *Patterson v. New York*, 432 U.S. 197 (1977) that a State may constitutionally require a defendant to carry the burden of proving an affirmative defense, so long as the State must prove beyond a rea-

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[1] The statute is reproduced in its original and amended form in note 4 at page 6, *infra*.

sonable doubt every element of the offense charged.[2] *Patterson* upheld a New York law[3] which placed such a burden on the defendant raising the affirmative defense of extreme emotional disturbance. The court held that such an affirmative defense did not serve "[t]o negate any facts of the crime which the State is to prove in order to convict [the defendant] of murder," but rather, is a separate issue for the defendant to prove. 432 U.S. at 207. The Court would not extend *Mullaney* to a Constitutional imperative that a State must disprove beyond a reasonable doubt every affirmative defense raised by a defendant. *Id.* at 210. The Due Process Clause does not put a State to the choice of either undertaking disproving the existence of an affirmative defense or not allowing the mitigating defense at all. *Id.* at 207-08. Indeed, several jurisdictions reject the admission of any evidence of mental disease or defect short of insanity. *See* cases cited in *State v. Humanik, supra*, 199 N.J. Super. at 298-99.

Under the rule in *Patterson*, therefore, the State may require a defendant to prove his affirmative defense, so long as the State alone carries the burden of proof as to the elements of the offense. N.J.S.A. 2C:4-2 allows the defendant to raise the affirmative defense of the existence of a mental disease or defect; the defendant must prove

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[2] The Appellate Division opinion, in *Humanik*, 199 N.J. Super. at 297, observed that, following the later pronouncement of *Patterson v. New York*, 432 U.S. 197 (1977), the Montana Supreme Court upheld the constitutional validity of a statute nearly identical to N.J.S.A. 2C:4-2. *State v. McKenzie*, 177 Mont. 280, 581 P.2d 1205 (1978) vacated and remanded *sub. nom. McKenzie v. Montana*, 443 U.S. 903, 99 S.Ct. 3094, 61 L.Ed.2d 871 (1979), aff'd. on remand 186 Mont. 481, 608 P.2d 428 (1980), *cert. den.*, 449 U.S. 1050, 101 S.Ct. 626, 66 L.Ed.2d 507 (1980).

[3] New York Penal Law §125.25 provides for the affirmative defense of extreme emotional disturbance. The jury was instructed, "[c]onsistent with New York law, that the defendant had the burden of proving his affirmative defense by a preponderance of the evidence." 432 U.S. at 200.

the existence of such mental defect or disease by a preponderance of the evidence. Once the State has met its burden on the elements of the crime of murder, that defendant has purposely or knowingly caused death or serious bodily injury resulting in death, N.J.S.A. 2C:11-3, the defendant may here, as in *Patterson*, be burdened with proving a mitigating defense. We do not find that such a burden violates due process or shifts the burden of proof on an element of the offense. The petitioner's claim on this ground should be dismissed.

Petitioner's second claimed basis for relief is that the retroactive application of the 1981 amendment to N.J.S.A. 2C:4-2, which required the petitioner to prove the affirmative defense of mental disease or defect, was a violation of the Constitution's prohibition against *ex post facto* laws. As originally enacted, N.J.S.A. 2C:4-2 provided for the admissibility of evidence of a mental disease or defect when relevant to negate the requisite culpable state of mind. In the absence of such evidence the statute expressed the presumption that no such condition existed.[4]

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[4] Compare the original statute, with the amended version:

*2C:4-2. Evidence of mental disease or defect admissible when relevant to element of the offense.*

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

The amended statute, with the new language appearing in the last underlined sentence, follows:

*2C:4-2. Evidence of mental disease or defect admissible when relevant to element of the offense.*

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of

The existing language, prior to the amendment, "[w]as merely designed to place upon the defendant the burden of producing evidence of mental impairment." *State v. Humanik*, 199 N.J. Super. at 300.

Petitioner points to the section of New Jersey's Criminal Code dealing with affirmative defenses, generally, N.J.S.A. 2C:1-13, to argue that, absent a provision to the contrary, the burden of disproving any affirmative defense falls on the State once the defendant has produced evidence supporting the defense. Appellant's Brief at 35. *Accord, State v. Galiyano*, 178 N.J. Super. 393, 397 (App. Div. 1981). More recently, a trial court has construed the same statute, N.J.S.A. 2C:1-13, and held that once the defendant produces evidence supporting an affirmative defense the burden falls upon the State to disprove it beyond a reasonable doubt. *State v. Tate*, 194 N.J. Super. 622, 633-34 (Law Div. 1984), aff'd 198 N.J. Super. 285 (App. Div. 1984), rev'd on other grounds, 102 N.J. 64 (1986).[5] Thus, prior to the 1981 amendment to N.J.S.A. 2C:2-4 (which placed the burden on a defendant to prove the affirmative

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the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. *Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.*

[5] New Jersey courts have similarly placed the burden on the State regarding other defenses. *See State v. Brown*, 131 N.J. Super. 228 (App. Div. 1974), aff'd 66 N.J. 146 (1975) (burden on State to prove beyond a reasonable doubt that assertion of self-defense was untrue; *accord, State v. Gardner*, 51 N.J. 444 (1968); *State v. Fair*, 45 N.J. 77 (1965) (burden on State regarding assertion of defense of other); *State v. Wilson*, 158 N.J. Super. 1 (App. Div. 1978) (State has burden to prove beyond a reasonable doubt defendant intended to kill victim or do serious bodily harm, and that death was not an accident or mistake); *State v. Combariaati*, 186 N.J Super. 375 (Law Div. 1982), *aff'd* 192 N.J. Super. 131, certif. denied 97 N.J. 694 (once defendant raises affirmative defense, against theft charge, of claim of right, and produces some evidence, then the State must prove beyond a reasonable doubt that defendant knew the property was not his).

defense of mental disease or defect by a preponderance of the evidence), the burden of proof on this issue, as with other affirmative defenses, resided with the State.[6]

In petitioner's case, he committed the crime on August 11, 1981—prior to the effective date of the amendment to N.J.S.A. 2C:2-4, (September 24, 1981) but was tried in June 1982—after the effective date of the amendatory provision. Mr. Humanik argues that the application of amended N.J.S.A. 2C:2-4 to him—with the increased burden it placed upon a defendant—violated the *ex post facto* clause.

The Supreme Court has listed two critical elements for a criminal or penal law to be *ex post facto*: 1) it must be retroactive, that is, it must apply to events occurring before its enactment; and, 2) it must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1980). Courts have given guidance from time to time as to what qualifies as a law subject to the *ex post facto* clause. It is generally understood that the prohibition protects against "[s]tatutes punishing as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed. . . ." *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

The Supreme Court stated in *Dobbert v. Florida*, 432 U.S. 282, 293 (1977), that a procedural change is not *ex post facto* even if it may work to the disadvantage of the defendant. The New Jersey Supreme Court ruled in *State*

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[6] We reach this conclusion notwithstanding the Appellate Division's reliance on *State v. Molnar*, 81 N.J. 475 (1980), as giving notice of a change in the allocation of the burden of proof for the affirmative defense of mental disease or defect. Our departure from this finding of the *Humanik* opinion, 199 N.J. Super. at 303, is discussed *infra*, pp 10-11.

*v. Molnar*, 81 N.J. 475, 488 (1980), that a change in allocation of the burden of proof is a procedural change. Were the matter as simple as matching together authoritative rule-making we might dismiss the present petition without more. But the United States Supreme Court, commenting on the principle cited from *Dobbert, supra*, has noted that simplicity of definition will not automatically resolve the dispute. "[A]lteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver, supra*, 450 U.S. at 29, n.12.

Indeed, in dissenting from the Court's denial of writs of certiorari in two Kentucky cases where the Kentucky Supreme Court had held that a statute abrogating the corroboration doctrine could be retroactively applied consistent with the *ex post facto* clause, Justice White, joined by Justices Powell and Brennan, noted the "[e]vident confusion among lower courts concerning the application of the Ex Post Facto Clause to changes in rules of evidence and procedure. . ." *Murphy v. Kentucky* and *Phillips v. Kentucky*, 465 U.S. 1072, 79 L.Ed.2d 751, 752 (1984). Among the cases cited therein were *Bowyer v. United States*, 422 A.2d 973 (D.C. 1980) (invalidating retroactive application of abolition of the requirement of corroboration of testimony of sex crime victims); *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981) (same application invalidated); *Government of Virgin Islands v. Civil*, 591 F.2d 255, 259 (3d Cir. 1979) (repeal of a statute requiring corroboration of accomplice testimony "[r]educes the amount of proof necessary for conviction" and cannot constitutionally be applied retroactively).

The appellate opinion in *Humanik* also noted the "evident disparity of opinions among the courts regarding the applicability of the *ex post facto* clause to alterations in the law of evidence." 199 N.J. Super. at 303.[7] But the

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[7] *See* the discussion in L. Tribe, American Constitutional Law §70-3

*Humanik* opinion sidestepped the *ex post facto* argument, since the court concluded that the 1981 amendment to N.J.S.A. 2C:2-4 did not change the burden imposed upon defendant. The court relied upon *State v. Molnar*, 81 N.J. 475 (1980), which upheld placing the burden of proving the defense of amnesia by a preponderance of the evidence on the defendant, as establishing the law in New Jersey on the burden of proof of the existence of a mental disease or defect. The *Molnar* case was decided in 1980—one year before the commission of the crime by Humanik and before the amendment to N.J.S.A. 2C:2-4. Thus, the *Humanik* court reasoned that the 1981 statutory amendment "did not change the law [regarding the burden of proving mental defect] in that respect." 199 N.J. Super. at 303. Our reading of *Molnar* does not lead to the same conclusion.

The *Molnar* Court was troubled by the particular susceptibility of fabrication of an amnesia defense; that concern led to its holding on allocation of the burden of proof. "[I]f the burden of proof were not placed on the defendant, perjury trials would be a particularly fertile field for the abuse of the amnesia defense, especially in light of the recognition that 'amnesia is present in some degree in everyone. . . .' " 81 N.J. at 492 (citation omitted). Commenting on N.J.S.A. 2C:4-2, in its earlier pre-amendment version, the *Molner* Court noted: "[I]t is not entirely clear to us that the Legislature intended such an easily fabricated condition as 'amnesia' to be embraced by this provision." *Id.* at 492, n.6.

The amnesia defense raised in *Molnar* and the court's analysis of the burdens of proof must be considered *sui generis*; that case cannot be read as supporting the broad proposition that the court in *Humanik* posited; *i.e.*, that the law in New Jersey prior to the 1981 amendment to N.J.S.A. 2C:2-4 placed a defendant on notice that he was

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at 483-84 (1978), and cases cited in *United States v. Kowal*, 596 F.Supp. 375, 377 (D. Conn. 1984).

required to prove *any* mental disease or defect by a preponderance of the evidence. We conclude that the 1981 statutory amendment did modify the existing law. Therefore, we will reach the *ex post facto* analysis.

The Insanity Defense Reform Act of 1984, 18 U.S.C.A. §20, which narrowed the definition of insanity and reallocated the burden of proof to the defendant, was held invalid as retroactively applied in *United States v. Kowal*, 596 F.Supp. 375 (D.Conn. 1984). Of particular interest in the present matter is the *Kowal* court's holding on the retroactive application of the altered burden of proof of this federal insanity law:

> Application of the newly-enacted burden to this defendant thus runs afoul of the ex post facto prohibition. Whether viewed as in effect an alteration of a substantial right, while taking a seemingly procedural form, . . . [citations omitted] or as a procedural change which operates to modify the quantum and kind of proof required to establish guilt or otherwise affects the defendant in a harsh or arbitrary manner, *see Beazell* at 170-71, 46 S.Ct. at 68-69, this defendant cannot constitutionally be required to assume the burden of proving insanity.

596 F. Supp. at 379; *accord, United States v. Prickett*, 604 F.Supp. 407, 410 (S.D.Ohio 1985). *Kowal* has been cited as authority on the *ex post facto* principle in later cases. *See United States v. Lakey*, 610 F.Supp. 210, 212-13 (D.C. Tex. 1985); *United States v. Teller*, 762 F.2d 569, 576, n.4 (7th Cir. 1985). The Department of Justice has accepted the view expressed in *Kowal*. U.S. Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted By the 98th Congress 58, 65 (1984), cited in *Teller, supra*.[8]

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[8] Although the *Kowal* decision preceded *Humanik*, the court in *Humanik* makes no mention of that case.

Based upon, *inter alia*, the Third Circuit's opinion in *Government of Virgin Islands v. Civil*, *supra*, where an evidentiary change altering the amount of proof necessary for conviction could not be applied retroactively, and on *United States v. Kowal*, *supra*, where the reallocation of the burden of proof is a substantial alteration subject to the *ex post facto* prohibition, we find that the application by the trial court of the amendment of N.J.S.A. 2C:4-2 which placed the burden of proving, by a preponderance of the evidence, the affirmative defense of mental disease or defect, on the defendant, was a violation of the *ex post facto* clause.

Accordingly, we recommend that a writ of habeas corpus issue.

Respectfully submitted,

/s/ Freda L. Wolfson
Freda L. Wolfson
United States Magistrate

Dated: October 23, 1986

## APPENDIX E

## SUPREME COURT OF NEW JERSEY
## C-703 SEPTEMBER TERM 1984

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## 23,719

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STATE OF NEW JERSEY,
*Plaintiff-Respondent,*

vs.

JOHN M. HUMANIK, JR.,
*Defendant-Petitioner.*

### ON PETITION FOR CERTIFICATION

Received
May 17 1985
Div. of Criminal Justice Appellate Section

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5197-81T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 14th day of May, 1985.

/s/Stephen W. Townsend
CLERK OF THE
SUPREME COURT

FILED
May 16 1985
Stephen W. Townsend
Clerk

## APPENDIX F

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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A-5197-81T4

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STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

v.

JOHN M. HUMANIK, JR.,

*Defendant-Appellant.*

ORIGINAL FILED
FEB 6 1985
ELIZABETH McLAUGHLIN
Clerk

Argued January 8, 1985- Decided FEB 6 1985

Before Judges Michels, Petrella and Baime.

On appeal from Superior Court of New Jersey, Law Division, Ocean County.

Joel I. Rachmiel argued the cause for appellant (Rachmiel and Ferdinand, attorneys; Mr. Rachmiel, on the brief).

Marijean Raffetto Stevens, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General, attorney; Ms. Stevens, of counsel and on the brief).

The opinion of the court was delivered by BAIME, J.A.D.

This appeal presents novel questions pertaining to the constitutionality of *N.J.S.A.* 2C:4-2. As amended, that statute requires the defendant to prove mental disease or defect by a preponderance of the evidence when the defense of diminished capacity is raised.[1] At issue is whether the statute unconstitutionally shifts the burden of proof with respect to an element of the criminal offense. Auxiliary questions concern whether retroactive application of *N.J.S.A.* 2C:4-2 constitutes a violation of the *ex post facto* prohibition set forth in the Federal[2] or State Constitution.[3] We hold that the statute is not violative of substantive and procedural due process and was properly applied at defendant's trial. We, thus, affirm defendant's conviction.

The facts necessary for resolution of the difficult issues presented need not be recounted at length. Following a protracted jury trial, defendant was convicted of murder. *N.J.S.A.*2C:11-3. Defendant was sentenced to life imprisonment and ordered to serve a term of 25 years without being eligible for parole. In addition, the trial judge imposed a penalty of $10,000 payable to the Violent Crimes Compensation Board. At trial, defendant conceded that he shot and killed his former girlfriend at her parent's home in Toms River. The sole question presented pertained to defendant's state of mind at the time of the homicide. More specifically, defendant contended that he was suffering from a mental disease or defect which precluded

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[1] The statute reads as follows:

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.

[2] *U.S. Const.*, Art. I, §10, cl. 1.

[3] *N.J. Const.*, (1947), Art. IV, §VII, par. 3.

him from harboring the requisite mental state required by *N.J.S.A.*2C:11-3. Alternatively, defendant claimed that the killing was accidental.

The circumstances directly surrounding the shooting cannot be considered in a vacuum. Rather, the tragic incident was the culmination of a series of attempts by the victim, Lisa Guzzo, to sever her long-standing relationship with defendant. The two first met in the summer of 1978 when defendant was 17 and the decedent was 12. Despite the disparity in their ages, defendant was immediately attracted by Ms. Guzzo. They began dating shortly after her thirteenth birthday. In addition, defendant developed a strong attachment to the Guzzo family. Over the years, defendant often stayed at the Guzzo's home and generally addressed the victim's mother as "mom." This strong relationship was apparently attributable to defendant's "emotionally deprived upbringing." Defendant came from a broken home and resided with his aunt and her two brothers. In any event, defendant's feelings were reciprocated and he continued dating the decedent until the summer of 1981.

On August 5, 1981, Ms. Guzzo told defendant that she had met another man and wished to terminate their relationship. Defendant was obviously devastated. On the following day, he went to the Hillside municipal building and applied for a permit to purchase a gun. After filing his application, defendant made several attempts to determine the identify of the decedent's new boyfriend. When his efforts proved unavailing, defendant proceeded to his uncle's house. While there, defendant's uncle showed him his handgun and demonstrated how to load and unload it. The next day, defendant returned to his uncle's house and "test fired" the weapon. At trial, defendant testified that he harbored thoughts of shooting the decedent at this time.

On the following weekend, defendant stayed at his aunt's summer bungalow in Toms River. After unsuccessfully at-

tempting to meet the decedent at her place of employment in Ortley Beach, defendant went to a sporting goods store where he purchased a box of .32 caliber ammunition for his uncle's gun. He also purchased a hunting knife. It is undisputed that defendant continued to fantasize about killing Ms. Guzzo at this time. Several days after purchasing the ammunition, defendant proceeded to his uncle's house where he obtained the handgun. Thereafter, he made one last attempt to convince the decedent not to leave him. During their conversation, defendant displayed the weapon. When Ms. Guzzo threatened to telephone her mother, defendant departed and went to his aunt's house.

At approximately 7 p.m. that evening, defendant drove to the decedent's home again seeking to determine the identity of her new boyfriend. Defendant carried with him his uncle's fully loaded handgun, a knife and a pair of binoculars he had purchased earlier in the day. When he arrived, defendant noticed a late model M.G. parked in the driveway which he assumed belonged to the decedent's boyfriend. Defendant then parked his automobile approximately a block away from the Guzzo's home and proceeded on foot through the woods. Unable to observe the decedent, defendant returned to his automobile and parked it on another street. Defendant then went back into the woods and waited for the decedent and her boyfriend to leave. After approximately 40 minutes had elapsed, defendant decided to free Ms. Guzzo's puppy from the dog pen hoping that this would attract her attention. When the decedent and her sister came out of the house, defendant, armed with the handgun and the knife, surrepticiously entered the den through the sliding glass door. When Ms. Guzzo returned with her boyfriend, Stanley Emanuels, and her sister, defendant pointed the gun and knife in their direction and ordered them to be seated. During the ensuing hours, defendant sought to persuade Ms. Guzzo to return to him. When she threatened to call for assistance, defendant pulled the telephone off the wall.

At approximately 11:30 p.m., defendant heard the sound of an automobile in the driveway. Peering from the window, defendant observed the decedent's parents approaching the house. At this point, defendant, gun in hand, ran toward the sliding glass door which led to the backyard shouting "this is where I make my exit." As he exited, defendant said "it's been nice knowing you Stanley; we could have been friends, Lisa." Defendant pointed the gun at the decedent and fired the fatal shot. After the shooting, defendant fled from the scene and remained a fugitive for a period of two months. During this time, defendant's travels took him to New York, North Carolina and Florida. Defendant was ultimately apprehended in a Las Vegas casino. At the time of his arrest, defendant was carrying the murder weapon.

Defendant testified that the shooting was accidental. According to defendant, he did not purposely pull the trigger. Defendant first realized what had occurred when he saw the decedent fall after the shot was fired and noticed blood on his hand. Conflicting expert testimony was presented with respect to defendant's mental and emotional condition at the time of the incident. Several psychologists testified that defendant suffered from a "borderline personality disorder" and that he did not purposely or knowingly kill the decedent. On rebuttal, the State presented two psychiatrists. They testified that defendant had a marginal "personality disorder," but that his cognitive abilities were in no sense affected. According to their testimony, defendant was fully capable of performing the mental operations required for a conviction under *N.J.S.A.*2C:11-3.

The trial judge charged the jury with respect to the offenses of murder, aggravated manslaughter and manslaughter. In his instructions, the judge noted that the "burden of proving the defendant's guilt rest[ed] heavily on the State" and that it "never shifted." The court went on to state that defendant "had no duty or obligation" to prove his innocence. According to the trial judge, the State

"had the burden of proving each of the elements of the crimes" charged. In defining the elements of murder, the court emphasized the obligation of the State to prove "purpose or knowledge beyond a reasonable doubt." Absent such a proof, defendant was entitled to an acquittal. The court also instructed the jury with respect to the defense of diminished capacity. In that regard, the trial judge recited defendant's contention that he "suffered from a mental disease or defect" and that this illness precluded him from harboring the requisite culpability required for a conviction of murder. In accordance with the provisions of *N.J.S.A.*2C:4-2, the jury was advised that defendant was required to prove the existence of a mental defect or disease by a preponderance of the evidence. After approximately three hours of deliberations, the jury found defendant guilty of murder. This appeal followed.

I

We will first address questions pertaining to the constitutionality of *N.J.S.A.*2C:4-2. As noted previously, that statute permits the defendant to introduce evidence of a mental disease or defect to show that he did not harbor the requisite culpability state required for a conviction. Under the statute, the defense is obliged to prove the existence of a mental disease or defect by a preponderance of the evidence. Defendant contends that the statute contravenes settled principles inherent in the concept of due process because it shifts the burden of proving a core element of the crime. We disagree.

The State's obligation to prove the guilt of the accused beyond a reasonable doubt had its genesis in the common law of England and is constitutionally compelled. *See, e.g., Mullaney v. Wilbur*, 421 *U.S.* 684, 685, 95 *S.Ct.* 1881, 44 *L.Ed.*2d 508, 511 (1975); *In re Winship*, 397 *U.S.* 358, 361, 90 *S.Ct.* 1068, 25 *L.Ed.*2d 368, 373-374 (1970); *State v. Gardner*, 51 *N.J.* 444, 459 (1968). It has been said that the requirement is "bottomed on a fundamental value de-

termination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship, supra*, 397 *U.S.* at 372, 90 *S.Ct.* at ___, 25 *L.Ed.*2d at 380. (Harlan, J., concurring). No one currently disputes the settled principle that the State bears the burden of proving beyond a reasonable doubt each element of the offense charged including the requisite mental state. In the latter respect, the rule is derived from the common law concept that criminal sanctions will not be imposed upon a defendant unless there exists a "concurrence of an evil-meaning mind with an evil-doing hand." *State v. Williams*, 29 *N.J.* 27, 41 (1959).

While it is clear that "our society has willingly chosen to bear a substantial burden in order to protect the innocent," *Patterson v. New York*, 432 *U.S.* 197, 208, 97 *S.Ct.* 2319, ___, 53 *L.Ed.*2d 281, 291 (1977), it is equally plain that the risk it must suffer is not without limits. The United States Supreme Court has "decline[d] to adopt as a constitutional imperative [the principle] . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Id.*, 432 *U.S.* at 210, 97 *S.Ct.* at ___, 53 *L.Ed.*2d at 292. Proof of the nonexistence of an affirmative defense has never been constitutionally compelled. In *Leland v. Oregon*, 343 *U.S.* 790, 72 *S.Ct.* 1002, 96 *L.Ed.* 1302 (1952), for example, the United States Supreme Court held that a state statute which placed upon the defendant the burden of proving insanity was not violative of due process. The question of insanity was said not to pertain to an element of the offense. *See also State v. Lewis*, 67 *N.J.* 47 (1975); *State v. Cordasco*, 2 *N.J.* 189 (1949); *State v. Molnar*, 133 *N.J.L.* 327 (E & A 1945); *State v. Sceifo*, 58 *N.J. Super.* 472 (App.Div. 1959), certif. den. 31 *N.J.* 555 (1960). In a somewhat similar vein, the Supreme Court more recently upheld the validity of a New York statute which required the defendant to prove by a preponderance of the evidence the affirmative defense of

extreme emotional disturbance in order to reduce a murder charge to manslaughter. *Patterson v. New York, supra*, 432 *U.S.* at 206, 97 *S.Ct.* at ___ , 53 *L.Ed.*2d at 289. Since the statute did not alter the prosecution's obligation to prove every fact necessary to constitute the crime, it did not unconstitutionally shift the burden of proof. *See State v. Tuscano*, 74 *N.J.* 421, 443 (1977); *State v. Rockholt*, 186 *N.J. Super.* 539 (App.Div. 1982), aff'd 96 *N.J.* 570 (1984). In contrast, the Supreme Court in *Mullaney v. Wilbur, supra*, declared unconstitutional a Maine statute which placed upon the defendant the burden of proving by a preponderance of the evidence that the killing was committed in the heat of passion or sudden provocation in order to reduce the offense of murder to manslaughter. Although the statute was phrased in terms of an affirmative defense, as applied, it actually served to compel the defendant to disprove an element of the crime of murder. 421 *U.S.* at 686-687, 95 *S.Ct.* at, 44 *L.Ed.*2d at 512. The common thread running through all of these decisions is that a state may constitutionally require the defense to bear the burden of persuasion with respect to a fact or group of facts either as an affirmative defense or as mitigation as long as the prosecution remains obliged to prove every element of the offense.

It is against this backdrop that we consider the constitutionality of *N.J.S.A.*2C:4-2. Although the statute purports to establish an "affirmative defense," that thesis is highly questionable in light of our prior case law. The admissibility of evidence pertaining to mental or emotional illness as it bears upon the question of *mens rea* has had a checkered history. Earlier decisions were inconsistent and were so read by a majority of the United States Supreme Court in *Fisher v. United States*, 328 *U.S.* 463, 474, 66 *S.Ct.* 1318, 90 *L.Ed.* 1382, 1389 n.12 (1946). Compare *State v. Close*, 106 *N.J.L.* 321, 324 (E & A 1930); *State v. Schilling*, 95 *N.J.L.* 145, 148 (E & A 1920); *Wilson v. State*, 60 *N.J.L.* 171, 184 (E & A 1897) with *State v.*

*Rodia*, 132 *N.J.L.* 199 (E & A 1944); *State v. Noel*, 102 *N.J.L.* 659, 676 (E & A 1926); *State v. Maioni*, 78 *N.J.L.* 339, 341 (E & A 1909). The subject was substantially clarified in *State v. DiPaolo*, 34 *N.J.* 279, 294-297 (1961), *cert.* den. 368 *U.S.* 880, 82 *S.Ct.* 130, 7 *L.Ed.*2d 80 (1961). Noting that the issue had received uneven treatment, Chief Justice Weintraub wrote:

> The difficulty seems to be that the topic is sometimes explored under the label of 'partial responsibility' or 'diminished responsibility' or perhaps confused with some other concept intended to be so described. Both of those characterizations are misleading since they tend to connote an 'affirmative defense' designed to defeat a case the State has otherwise established and thus to suggest the intrusion of an amendment to the established basis for criminal accountability. Actually the question is simply whether there shall be excluded evidence which merely denies the existence of facts which the State must prove to establish [the offense charged.] *Id.* at 294.

* * *

> The three mental operations [necessary to establish murder] are matters of *fact*. The judiciary cannot bar evidence which rationally bears upon the factual inquiry the Legislature has ordered. The capacity of an individual . . . to execute a homicidal design, or any deficiency in that capacity, may bear upon the question whether he did *in fact* did so act. Hence evidence of any defect, deficiency, trait, condition, or illness which rationally bears upon the question whether those mental operations did *in fact* occur must be accepted. Such evidence could be excluded only upon the thesis that it is too unreliable for the

> courtroom, a thesis which would not square with the universal acceptance of medical and lay testimony upon the larger issue whether there was a total lack of criminal responsibility. *Id.* at 295. (emphasis supplied).

*See also State v. Sikora*, 44 *N.J.* 453, 473 (1965). (Weintraub, C.J., concurring). Although *State v. DiPaolo, supra*, and its progeny, *State v. Conforti*, 53 *N.J.* 239, 246 (1969) and *State v. Sikora, supra*, pertained to the use of psychiatric testimony to contest the existence of premeditation, deliberation and wilfullness under our prior murder statute, the rationale obviously applies to all offenses requiring as an element of proof a particular state of mind. In any event, the Legislature plainly intended to codify the concept in enacting *N.J.S.A.*2C:4-2. *See Final Report of the New Jersey Law Revision Commission, Commentary to the New Jersey Penal Code*, pp. 99-100 (1971). *See also* Weinhofen and Overholser, "Mental Disorder Affecting the Degree of Crime", 56 *Yale L.J.* 959 (1947). It is, thus, abundantly clear that the statute does not create an affirmative defense as that term is generally used. In short, the defense of diminished capacity is not designed to defeat a case the State has otherwise established. Rather, the term is a legal colloquialism referring to psychiatric or other evidence contesting the State's thesis that the accused acted with the mental state required to be proven in order to convict.

So posited, the question remains whether the Legislature can, consistent with constitutional principles, place upon the defense the burden of establishing mental disease or defect. We conclude that the statute comports with due process. The identical issue was addressed by our Supreme Court in a somewhat related context in *State v. Molnar*, 81 *N.J.* 475 (1980). There, defendant, the acting warden of a prison, was convicted of perjury. The principal thrust of the prosecutor's case at trial was that the defendant had deliberately lied when he testified before the grand

jury that he was not offered a bribe by an escaped prisoner. The defense conceded that defendant's testimony was untrue. Defendant claimed, however, that he was involved in an automobile accident prior to appearing before the grand jury. He asserted that he was suffering from amnesia and, thus, did not knowingly lie to the grand jury. In his instruction to the jury, the trial judge noted that the State was required to prove beyond a reasonable doubt that defendant knowingly testified falsely. Nevertheless, since the defense was premised upon the allegation that defendant suffered from a mental defect, amnesia, it bore the burden of establishing that underlying fact by a preponderance of the evidence. A divided Appellate Division reversed. 161 *N.J. Super.* 424 (App.Div. 1978). The majority concluded that "the amnesia evidence was not being received in support of an affirmative defense, that is, by way of confession and avoidance, or as a justification or excuse for conduct which would otherwise be criminal . . . but to create a reasonable doubt concerning the existence of an essential element of the offenses with which he was charged and as to which the State, not he, bore the burden of proof." *Id.* at 444-445. (citations omitted).

The Supreme Court reversed in a unanimous decision. Initially, the Court noted that the defense of amnesia was not offered to establish defendant's insanity. *State v. Molnar*, *supra* at 490. Although loss of memory claims had generally been considered within the context of the defense of insanity, *see State v. Risden*, 56 *N.J.* 27 (1970); *State v. Coleman*, 46 *N.J.* 16 (1965), *cert.* den. 383 *U.S.* 950, 86 *S.Ct.* 1210, 16 *L.Ed.*2d 212 (1966); *State v. Huff*, 14 *N.J.* 240 (1954), such cases were distinguished. *State v. Molnar*, *supra* at 490. The Court took pains to note that defendant's "sanity [was] not an issue" and, thus, the cases holding that the accused bore the burden of persuasion with respect to that issue were inapposite. *Ibid.* As posed by the Court, the essential factual question presented at trial was whether defendant "knew of the illicit scheme when he

failed to report it and when he testified to the contrary before the grand jury." *Id.* at 491. While finding that the insanity cases were not applicable, the Court, nonetheless, upheld the trial judge's conclusion that defendant was obliged to prove the fact of amnesia by a preponderance of the evidence. *Id.* at 493. The Court noted that the claim of amnesia was a "fertile field" for abuse due to the "vagaries of human memory" and the fact that it is "present in some degree in everyone." *Id.* at 492. Such a defense could easily be contrived after the commission of a criminal act. *Ibid.* Therefore, the Court found nothing constitutionally impermissible in requiring the accused to establish the fact of amnesia as long as the State bore the ultimate burden of proving knowledge of falsity beyond a reasonable doubt. *Id.* at 491. The Court thus drew a distinction between the fact underlying the defense presented, amnesia, and the ultimate element required to be established by the State beyond a reasonable doubt, knowing falsity. *Id.* at 491. The Court noted that the defense of amnesia did "not necessarily refute [defendant's] knowledge of official corruption. Assuming he had established that his memory was usually deficient, it would remain open to question whether he retained a recollection of the specific facts which were the subject of official investigation." *Ibid.* The Court noted that "[e]ven suffering from amnesia, he may still have remembered the bribe offer." *Ibid.* The Court concluded that "the State need not disprove defendant's amnesia beyond a reasonable doubt and Molnar's request to charge the State with that burden was properly denied". *Ibid.*

The same reasoning was applied by the Montana Supreme Court in upholding the constitutional validity of a statute almost identical to ours in *State v. McKenzie*, 581 *P.*2d 1205 (Mont. Sup. Ct. 1978), vacated and remanded *sub nom. McKenzie v. Montana*, 443 *U.S.* 903, 99 *S.Ct.* 3094, 61 *L.Ed.*2d 871 (1979), aff'd on remand 608 *P.*2d 428 (Mont. Sup. Ct. 1980), *cert.* den 449 *U.S.* 1050,

101 *S.Ct.* 626, 66 *L.Ed.*2d 507 (1980).[4] There, the Court noted that it was not unfair to impose upon the accused the obligation to prove mental disease or defect. Specifically, the Court stated that "[b]ecause psychiatric evaluation as to subtle gradations of mental impairment is highly subjective and not within the common experience of the layman juror, the State may in fairness require a defendant to convince the jury of his diminished capacity by a preponderance of the evidence." *Id.* at 1233. Nevertheless, the Court emphasized that the State was obliged to prove the accused's criminal mental state beyond a reasonable doubt. *Ibid.* Thus, the statute was held not to shift the State's burden of proving an essential element of the offense.[5]

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[4] Defendant accurately characterizes the procedural history of *McKenzie* as labored. The issue was first considered by the Montana Supreme Court in *State v. McKenzie*, 557 *P.*2d 1023 (Mont. Sup. Ct. 1976). The United State Supreme Court granted *certiorari*, *McKenzie v. Montana*, 433 *U.S.* 905, 97 *S.Ct.* 2968, 53 *L.Ed.*2d 1089 (1977), vacated the judgment and remanded the cause for further consideration in light of *Patterson v. New York*, *supra*. On remand the Montana Supreme Court affirmed, 581 *P.*2d 1205 (Mon. Sup. Ct. 1978). Subsequently, the Supreme Court granted *certiorari*, *McKenzie v. Montana*, 443 *U.S.* 903, 99 *S.Ct.* 3094, 61 *L.Ed.*2d 871 (1979), but this time remanded directing reconsideration in light of *Sandstrom v. Montana*, 433 *U.S.* 510, 99 *S.Ct.* 2450, 61 *L.Ed.*2d 38 (1979). Again on remand, the conviction was affirmed. *State v. McKenzie*, 608 *P.*2d 428 (Mont. Sup. Ct. 1980). The state court conceded that the jury instructions on rebuttable presumptions unconstitutionally shifted the burden of proof, but held that the error was harmless. *Id.* at 457-479. Thereafter, the United States Supreme Court denied *certiorari*. *McKenzie v. Montana*, 449 *U.S.* 1050, 101 *S.Ct.* 626, 66 *L.Ed.*2d 507 (1980).

[5] We are aware that the Oregon Supreme Court reached a contrary conclusion in *State v. Stockett*, 278 *Or.* 637, 565 *P.*2d 739 (Sup. Ct. 1977). There, the Court held that a similarly worded statute unconstitutionally shifted the burden of proving one of the essential elements of the offense. We do not find the *Stockett* opinion to be persuasive, however, since no consideration was given to the distinction between the existence of a mental disease or defect and the ultimate fact to be proved. Stated somewhat differently, the Court construed the Or-

We believe that these considerations are fully controlling here. We do not wish to denigrate the value of psychiatric testimony pertaining to gradations of mental impairment. We would be myopic, however, were we to fail to note the continuing controversy surrounding the defenses of insanity and diminished capacity. The lingering suspicion harbored by many is best evidenced by the fact that numerous jurisdictions have rejected diminished capacity as a defense. *See Lee v. State*, 265 *Ala.* 623, 93 *So.* 2d 757 (1957); *State v. Schantz*, 98 *Ariz.* 200, 403 *P.*2d 521 (1965); *Bates v. State*, 386 *A.*2d 1139 (Del. 1978); *Bethea v. United States*, 365 *A.*2d 64 (D.C. 1976), *cert.* den. 433 *U.S.* 911, 97 *S.Ct.* 2979, 53 *L.Ed.*2d 1095 (1976); *Zeigler v. State*, 402 *So.*2d 365 (Fla. 1981), *cert.* den. 455 *U.S.* 1035, 102 *S.Ct.* 739, 72 *L.Ed.*2d 153 (1981); *Ezzell v. State*, 88 *So.*2d 280 (Fla. 1956); *State v. Murray*, 375 *So.*2d 80 (La. 1979); *Johnson v. State*, 292 *Md.* 405, 439 *A.*2d 542 (1982); *Armstead v. State*, 227 *Md.* 73, 175 *A.*2d 24 (1961); *State v. Bouwman*, 328 *N.W.*2d 703 (Minn. 1982); *State v. Wilcox*, 70 *Ohio St.*2d 182, 436 *N.E.*2d 523 (1982); *State v. Flint*, 142 *W.Va.* 509, 96 *S.E.*2d 677 (1957); *Sprague v. State*, 52 *Wis.*2d 89, 187 *N.W.*2d 784 (1971). *See also Muench v. Isreal*, 715 *F.*2d 1124 (7th Cir. 1983), *cert.* den. ___ *U.S.* ___, 104 *S.Ct.* 2682, 81 *L.Ed.*2d 878 (1984). We are satisfied that the Legislature can constitutionally compel the defense to rebut the assumption of mental normalcy as long as the prosecution bears the burden of establishing the requisite state of criminal culpability beyond a reasonable doubt.[6] As described previously, the trial judge's

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egon statute as requiring the defense to disprove the requisite mental state. As noted, our Supreme Court in *State v. Molnar*, *supra*, held that while the defense was required to establish the existence of a mental disease or defect, the State, nonetheless, bore the burden of proving the defendant's criminal state of mind.

[6] We note that although the defense of insanity and diminished capacity are essentially different, they often overlap. Under the *McNaughten* rule, the defense of insanity is available where the "party

instructions clearly apprised the jury of the State's obligation in that regard. We, thus, reject defendant's contention that *N.J.S.A.*2C:4-2 deprived him of procedural and substantive due process.[7]

II

We next turn to defendant's argument that retroactive application of *N.J.S.A.*2C:4-2 violated the *ex post facto* pro-

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accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong." *State v. Lucas*, 30 *N.J.* 37, 68 (1959). Obviously, one who, by virtue of a mental disease or defect, does not know the "nature and quality" of his act may well be so incapacitated as to be unable to form the requisite mental state to be guilty of an offense. In that event, both the defenses of diminished capacity and insanity are available. On the other hand, there are undoubtedly cases in which the offender has the capacity to harbor the requisite mental state, but is sufficiently impaired so as not to be able to understand that what he is doing is wrong. Plainly, the defense of diminished capacity is preferrable from the strategic standpoint of the defense. The consequences of a successful claim of insanity and diminished capacity are completely different. A person found to be not guilty by reason of insanity is not necessarily set free. Rather, he is subject to commitment under the provisions of *N.J.S.A.*2C:4-8. *See, e.g., State v. Krol*, 68 *N.J.* 236 (1975); *State v. Kyles*, 166 *N.J. Super.* 343 (App.Div. 1979). There is no comparable restraint upon the freedom of an individual who is found not guilty because the trier of fact concluded that there existed a reasonable doubt as to the actor's purpose or knowledge. There can be no question that such an individual may well pose a substantial danger to the public. In all likelihood, his condition is unlike that produced by intoxication, which is only temporary. Nevertheless, our law permits the offender to go free despite the social menace that he presents.

[7] We also reject defendant's argument that the trial judge erroneously shifted the burden of proof when he advised the jury that use of a firearm under some circumstances can support the inference that the accused purposely or knowingly caused the decedent's death. Under the trial judge's instructions, the jury was free to reject that permissible inference. *See United States v. United States Gypsum Co.*, 438 *U.S.* 422, 98 *S.Ct.* 2864, 57 *L.Ed.*2d 854 (1978). *See also State v. Humphreys*, 54 *N.J.* 406,414 (1969); *State v. Corby*, 28 *N.J.* 106, 110 (1958); *State v. McCandles*, 190 *N.J. Super.* 75, 82-83 (App.Div. 1983).

hibitions set forth in the Federal and State Constitutions. As originally enacted, the statute merely provided that evidence of a mental disease or defect was admissible when relevant to the issue of whether the accused harbored the requisite criminal state of mind required for a conviction. The statute further provided that "[i]n the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense." Although this language is somewhat unclear, it would appear that it was merely designed to place upon the defendant the burden of producing evidence of mental impairment. On September 24, 1981, *N.J.S.A.*2C:4-2 was amended, thereby imposing upon the defendant the burden of proving mental disease or defect by a preponderance of the evidence. Since the amendment was enacted after the criminal event, but before the trial, defendant claims that it should not have been applied retroactively. In response, the State contends that the amendment was merely procedural and did not affect defendant's substantive rights.

The prohibition against *ex post facto* laws "is designed to secure substantial personal rights against arbitrary and oppressive legislation . . . ." *State v. Davis*, 175 *N.J. Super.* 130, 147 (App.Div. 1980), certif. den. 85 *N.J.* 136 (1980). The Constitution's drafters "sought to assure that individuals had fair warning of the impact of legislation and could rely on its meaning." *State v. T.P.M.*, 189 *N.J. Super.* 360, 366 (App.Div. 1983). *See also Weaver v. Graham*, 450 *U.S.* 24, 28-29, 101 *S.Ct.* 960, 963-64, 67 *L.Ed.*2d 17 (1981); *Dobbert v. Florida*, 432 *U.S.* 282, 292, 97 *S.Ct.* 2290, 2297, 53 *L.Ed.*2d 344 (1977), reh. den. 434 *U.S.* 882, 98 *S.Ct.* 246, 54 *L.Ed.*2d (1977); *Beazell v. Ohio*, 269 *U.S.* 167, 169-170, 46 *S.Ct.* 68, 70 *L.Ed.* 216 (1925). The clause "prohibits any law which in relation to the past offense or its punitive consequences, alters the situation of the offender to his disadvantage." *State v. T.P.M.*, *supra* at 336-367. *See also State v. Chapman*, 187 *N.J. Super.* 474 (App.Div. 1982).

In several decisions, the United States Supreme Court has held that "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.' " *Weaver v. Graham*, 450 *U.S.* 24, 29, 101 *S.Ct.* 960, 67 *L.Ed.*2d 17, 23 n.12 (1981), (quoting *Hopt v. Utah*, 110 *U.S.* 574, 590, 4 *S.Ct.* 202, 28 *L.Ed.* 262 (1884)). A substantial question exists as to whether evidentiary rules are to be considered substantive or procedural for this purpose. Our Supreme Court in *State v. Molnar, supra* at 488, held that "burdens of proof--those rules governing the degree of certainty the evidence must engender to warrant a given disposition by the trier of fact--are 'procedural' matters within the meaning of *N.J.S.A.*2C:1-1(c)(1)." The latter statute provides that in any case pending or initiated after the effective date of the Code involving a previously committed offense the procedural provisions are to apply. Hence, the Court held that the Code's provisions altering the burden of proof were to be given retroactive application to offenses committed prior to its enactment. *Ibid.* Although the Court had no occasion to consider the precise issue presented here, its holding is consistent with earlier pronouncements of the United States Supreme Court pertaining to the applicability of the *ex post facto* clause. In *Beazell v. Ohio, supra*, 269 *U.S.* at 170, 46 *S.Ct.* at ___ , 70 *L.Ed.* at 217, for example, the Court stated that statutory alterations do not fall within the *ex post facto* ban if they pertain to the mode of trial or the rules of evidence, do not deprive the accused of a defense, and operate only in a limited manner and insubstantial to his disadvantage. Similarly, in *Hopt v. Utah, supra*, a statute removing the disqualification of a certain class of people who may be witnesses was held not be fall within the *ex post facto* proscription. In *Thompson v. Missouri*, 171 *U.S.* 380, 18 *S.Ct.* 922, 43 *L.Ed.* 204 (1898), a statute changing the rules of evidence to allow testimony against an accused

that was previously inadmissible was found to be constitutionally subject to retroactive application. In contrast, the Court in other decisions has alluded to the broad language of *Calder v. Bull*, 3 *U.S.* (3 Dall.) 386, 390, 1 *L.Ed.* 648 (1798)[8] and has given the *ex post facto* provision greater reign. *See, e.g., Thompson v. Utah*, 170 *U.S.* 343, 18 *S.Ct.* 620, 42 *L.Ed.* 1061 (1898); *Kring v. Missouri*, 107 *U.S.* 221, 2 *S.Ct.* 443, 27 *L.Ed.* 506 (1883); *Cummings v. Missouri*, 71 *U.S.* (4 Wall.) 277, 18 *L.Ed.* 356 (1866). The decisions of the lower federal courts are inconsistent with respect to the question. *See, e.g., Government of Virgin Islands v. Civil*, 591 *F.*2d 255, 259 (3rd Cir. 1979) (repeal of corroboration statute reduces the amount of proof necessary for conviction and violates *ex post facto* prohibition); *United States v. Henson*, 486 *F.*2d 1292, 1304-1308 (D.C. Cir. 1973) (statute eliminating trial judge's discretion in admitting prior criminal convictions violates *ex post facto* prohibition); *United States v. Williams*, 475 *F.*2d 355, 356 (D.C. Cir. 1973) (statute shifting burden of proof to defendant as to insanity defense violates *ex post facto* prohibition); *Parker v. United States*, 235 *F.*2d 21, 22 (D.C. Cir. 1956) (statute revoking physician's privilege could be applied retroactively).[9]

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[8] "Every law that alters the legal rules of evidence, and requires less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender is *ex post facto*."

[9] Recently, Justices White, Brennan and Powell joined in a dissenting opinion in which they registered their strong objection to the Court's refusal to grant *certiorari* in *Phillips v. Kentucky*, ___ *U.S.* ___, ___ *S.Ct.* ___, 79 *L.Ed.*2d 751 (1984). There, the Kentucky Supreme Court held that a statute abrogating the corroboration doctrine could be retroactively applied consistent with the *ex post facto* prohibition. *See Murphy v. Commonwealth*, 652 *S.W.*2d 69 (Ky. Sup. Ct. 1983), and *Phillips v. Commonwealth*, 655 *S.W.*2d 6 (Ky. Sup. Ct. 1983). In their dissenting opinion, the three Justices emphasized the "evident confusion among lower courts concerning the application of the *Ex Post Facto* clause to changes in rules of evidence." ___ *U.S.* at ___, ___ *S.Ct.* at ___, 79 *L.Ed.*2d at 752.

We tend to believe that *N.J.S.A.*2C:4-2 can be applied retroactively because it does not decrease the nature, amount or quality of the evidence the State must present in order to obtain a conviction. As noted previously, the prosecution remains obliged to prove the requisite culpability state beyond a reasonable doubt. To that extent, it cannot be said that the statute "alters the situation of the offender to his disadvantage." *State v. T.P.M., supra* at 366-367. We need not dwell on the subject, however. In light of the evident disparity of opinions among the courts regarding the applicability of the *ex post facto* clause to alterations in the rules of evidence, *see Phillips v. Kentucky*, supra, we prefer to premise our holding on a slightly different basis. We conclude that the amendment did not serve to affect a change or modification of our rules of evidence. As noted, *State v. Molnar, supra*, held that it was constitutionally permissible to require the defendant to prove the existence of a mental defect, there amnesia, by a preponderance of the evidence. That decision preceded the trial of this case. Although *N.J.S.A.*2C:4-2 was originally silent with respect to the burden of proving mental impairment, the amendment did not change the law in that respect. The Supreme Court's holding in *State v. Molnar, supra*, was fully in force at the time of the commission of the offense. Neither the enactment of *N.J.S.A.*2C:4-2 nor adoption of the subsequent amendment altered the *Molnar* holding. We, thus, reject defendant's claim that application of *N.J.S.A.*2C:4-2 violated the *ex post facto* prohibition.

III

While a fugitive in Las Vegas, defendant wrote a lengthy letter to his aunt, Stephanie Humanik, detailing the events surrounding the homicide. Upon receiving the letter, Ms. Humanik gave it to defendant's sister, Kathryn Blunt, "for safekeeping." Apparently, she was concerned that the po-

lice would search her home. On September 29, 1981, several police officers interviewed defendant's family in an attempt to learn of his whereabouts. During the course of those inquiries, Ms. Blunt was advised that it was unlawful to "harbor a fugitive" or to hinder a prosecution. Despite having received several letters from defendant, the family denied having any contact with him. Ms. Blunt asked to meet alone with police officers. She subsequently took them to her home where she gave them the letter. The trial judge denied defendant's pretrial motion to suppress the evidence and the letter was subsequently admitted.

We are entirely satisfied that the letter was properly obtained by the police.[10] Defendant's reliance on *State v. Johnson*, 68 *N.J.* 349 (1975) is clearly misplaced. There, the police entered defendant's apartment ostensibly after his fiance consented. Departing from the United States Supreme Court's holding in *Scheckloth v. Bustamonte*, 412 *U.S.* 218, 93 *S.Ct.* 2041, 36 *L.Ed.*2d 854 (1973), our Supreme Court concluded that New Jersey's constitution afforded broader protection than its federal counterpart. Specifically, the validity of the search was said to depend upon whether the consent was voluntary, an essential element of which was the knowledge of the right to refuse. *State v. Johnson, supra* at 353-354.

Here, the issue of consent is not involved. Ms. Blunt's action in providing the police with defendant's letter was not directly instigated by the officers. Ms. Blunt never responded to the police officers' questions pertaining to defendant's whereabouts. Rather, she chose to turn over the letter. In short, the officers' inquiries were not tantamount to a request for consent to search. *See State v.*

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[10] Since the State does not challenge defendant's standing, we have no occasion to address the question whether defendant had a sufficient proprietary, possessory or participatory interest in the letter seized. *See Brown v. United States*, 411 *U.S.* 223, 93 *S.Ct.* 1565, 36 *L.Ed.*2d 208 (1973); *State v. Alston*, 88 *N.J.* 211, 228 (1981).

*McGivern*, 167 *N.J. Super.* 86, 89-90 (App. Div. 1979). Nor can it fairly be said that the conduct of the police was coercive. The Humanik family was not required to speak to the police. Once they chose to do so, however, they were subject to the provisions of our statutes which preclude hindering the apprehension of a fugitive by suppressing evidence. *See N.J.S.A.*2C:29-3. We are convinced that the police properly obtained the letter and that defendant's Fourth Amendment rights were not violated by its admission.

IV

Defendant's remaining arguments do not warrant extended discussion. They pertain to various evidentiary decisions of the trial judge. During the direct examination of the defense's psychiatrist, counsel sought to elicit testimony pertaining to a letter upon which the expert had relied in reaching his conclusion. The trial judge sustained the prosecutor's objection. We agree that the trial court erred in that respect.[11] It has long been the law that hearsay statements upon which an expert relies are admissible, not for establishing the truth of their contents, but to apprise the jury of the basis of the opinion reached. *See, e.g., Tramutola v. Bortone*, 63 *N.J.* 9, 15 (1973); *State v. Lucas*, 30 *N.J.* 37, 79 (1959); *Dietzeman v. Peterson*, 196 *N.J. Super.* 96, 101-102 (Law Div. 1984). Nevertheless, we are convinced that the error had no impact upon the jury. We note in that respect that the letter was ultimately admitted in evidence.

So too, we agree that on several occasions the trial judge erroneously precluded the defense from presenting

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[11] *Evid. R.* 56 (2) presently provides that "[t]he facts or data . . . upon which an expert bases an opinion may be those . . . made known to him . . . before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions . . . upon the subject, the facts or data need not be admissible in evidence." This rule went into effect after the trial.

testimony pertaining to various oral statements which were not offered to prove the truth of their contents. Such statements constituted verbal acts. *See, e.g., State v. Baldwin*, 47 *N.J.* 379, 394 (1966); *Ringwood Assoc's Ltd. v. Jack's of Route 23*, 166 *N.J. Super.* 36, 43 (App.Div. 1979); *Robinson v. Branch Brook Manor Apts.*, 101 *N.J. Super.* 117, 122 (App.Div. 1968), certif. den. 52 *N.J.* 487 (1968). Again, we are entirely satisfied that these minor errors in no sense prejudiced defendant's rights. We note in that regard that the evidence sought to be admitted was largely inconsequential in light of the factual mosaic elicited by the defense. As with error generally, the essential inquiry must be whether the trial judge's decisions prejudiced the defendant's rights. We are convinced from our careful review of the evidence that the errors noted, either singly or cumulatively, were not sufficiently grievous as to bring about an unjust result. Defendant was entitled to a fair trial, but not one that was error free.

V

Finally, we perceive no justifiable reason to disturb the sentence imposed. Contrary to defendant's assertion, the trial judge did not impose an extended term. As noted in *State v. Serrone*, 95 *N.J.* 23, 25-26 (1983), [a] life [term] for murder is really an ordinary sentence." *See also State v. McGuire*, 84 *N.J.* 508 (1980). Further, the sentence imposed was within statutory limits and fully satisfied the tripartite test set forth in *State v. Roth*, 95 *N.J.* 334 (1984). In our view, the trial judge's exercise of discretion was properly based upon findings of fact grounded in competent, reasonably credible evidence. So too, the court applied correct legal principles in exercising its discretion. Finally, the sentence imposed did not constitute such a clear error of judgment that it shocks the judicial conscience. *State v. Whitaker*, 79 *N.J.* 503, 512 (1979); *State v. Leggeadrini*, 75 *N.J.* 150, 157 (1977).

## VI

In sum, we have carefully considered defendant's arguments and are convinced that they are devoid of merit. Accordingly, the judgment of conviction is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
/s/Elizabeth McLaughlin
Clerk

## APPENDIX G

Now, as is every person who is charged with a crime and is a defendant in a criminal trial, Mr. Humanik has been presumed innocent from the moment he was charged throughout the trial, as I spoke to you now, and even as you enter into that jury room and consider of the charge as set forth in the indictment. That is unquestioned. And it is the burden that the State has to prove his guilt beyond a reasonable doubt of one of the charges which I will shortly call to your attention, the charge of murder and the lesser included charges of aggravated manslaughter and of manslaughter. And if the State should fail, then the defendant must be found not guilty of that particular charge.

As I said, the burden of proving the defendant's guilt rests heavily on the State and it never shifts back to the defendant. Mr. Humanik has had no duty or obligation to prove that he's innocent in the sense that we say that the State must prove his guilt. He didn't have the obligation to take the stand had he chosen not to do so, but he did.

It is the State that has the burden of proving each of the elements of the crimes that I'm going to charge you in just a short moment. And if there's a failure, then as to that particular crime, the defendant is entitled to be acquitted.

Now, I said beyond a reasonable doubt. We are not considering the probabilities or possibilities, because the standard is much more rigorous than possibility or probability or speculation. So I have used the term reasonable doubt. And how do I define it? (Transcript of April 1, 1982, at T118-23 to 120-7).

* * *

But reasonable doubt as you must use it as a most important tool is an honest and reasonable uncertainty as to the guilt of the defendant which exists in your minds

after you have fairly, completely and impartially considered all the testimony and all the evidence.

And reasonable doubt could arise from the evidence and the testimony as you had it presented before you here in the courtroom. It could also arise from some obvious lack of what was not presented. It can arise by inference from what was, in fact, presented, or it can arise by inference from what wasn't presented. (*Id.* at T120-14 to 121-1).

* * *

Finally, with regard to general guidelines, an approach to fact-finding. Keep in mind at all times that your verdict must be based solely on the testimony and the evidence presented here before you in this courtroom. (*Id.* at T121-21 to 25).

* * *

Also, keep in mind that if you should find the evidence and the testimony which relates to the question of the defendant's guilt on any of the crimes which I will shortly charge you, as being reasonably capable of two constructions, that is, one of guilt and one of innocence, then because you have not been convinced beyond a reasonable doubt, you must adopt the construction of innocence.

On the other hand, if you have been convinced beyond a reasonable doubt in connection with the question of the charge of crimes against the defendant, then you will find him guilty. (*Id.* at T122-7 to 19).

* * *

The defendant has conceded that he left at once. Now, the question of the circumstances of his leaving the scene after the shooting, of course, is a question which you may or may not consider as you choose. His manner of leaving the scene, his subsequent journeys thereafter, all of them if you desire, if you think appropriate, may be weighed and considered in connection with all the other evidence

in the case in making a determination of his mental state at the moment of the homicide.

And finally, one other item before I get to the specifics of the crimes. There is a general rule that witnesses are permitted to testify only from things they personally know. And that rule usually and normally prevents someone from testifying under oath as to his or her opinion. We make an exception to that, however, in the case of an expert. And we permit an expert to present his opinion to a jury on any matter in which it is found that he is apparently versed with sufficient special expertise which is material to the case being tried.

Now, we define an expert witness as one who has some special quality or skill or experience or training that the average person doesn't possess in a particular area and who therefore might be able to assist the jury in its fact finding duties.

In this case, we've had two psychiatrists and two psychologists testify. You--I am not going to attempt to repeat the testimony of Drs. Kuvin and Motley or psychologists Einhorn and Krass. I'm sure you have them fairly well in mind. And you will further recall, however, that there was a rather wide disagreement among them and a rather wide disparity in their analysis.

I say to you that you are not bound by the opinion of any one of the four of them, but I do say to you that you should consider their respective opinions and they are entitled to be given whatever weight you think their opinions are entitled to receive, either great or small, or if you choose all, or if you choose to reject.

Of course, one of the most important ways of judging the quality of the testimony of an expert is to consider the qualifications he's placed before you; and because he's a witness, also, you watch his demeanor and you listen. And you make the same determination concerning his cred-

ibility in addition to his expertise that you do any other witness.

Now, keep in mind—and this is important—with regard to any of these experts, that the opinion of each of them was based at least in part on sources other than first-hand knowledge.

In other words, they did not have first-hand knowledge of everything on which they came here to base their testimony upon; and therefore, the question of the truth of some of the information on which they said their opinions were based is relevant in weighing their opinions.

To put it differently, the value of an expert opinion depends on independent truths--proof, excuse me, independent proof of the truth of what was said to him by the defendant and the truth of the other sources on which the expert's said he relied in arriving at an opinion.

Therefore, you may find in favor of the expert testimony which in your opinion is entitled to the greater weight. You may determine to accept part of the expert opinion. You may determine that you want to reject all of the expert opinion; that is, within--solely within your province.

Finally, any expert opinion which you accept in whole or in part is only a single factor, not a determining factor, but a single factor in determining whether or not the State has carried its burden of proving the charge against the defendant beyond a reasonable doubt. (*Id.* at T123-8 to 126-13).

* * *

I repeat again as a starting point that the defendant was charged with the murder of Lisa Guzzo. Now, murder is defined as the unlawful killing of one person by another person, purposely or knowingly. The unlawful killing of another human being is also known as criminal homicide, and there are different kinds of criminal homicide, and I'm going to charge you about them.

First, murder. One who commits a killing commits it purposely when it is his conscious object; that is, if he forms a conscious mental desire—his intent is another way that you might say it—to cause death, or serious bodily injury resulting in death.

Death, obviously, I need not define.

Serious bodily injury is defined as an injury which creates a substantial risk of death or causes serious permanent loss or impairment of bodily function. In this case, we are not really concerned with going quite that far.

What is most important, however, is that you fix in your minds the definitions of purposely and of knowingly.

The nature of the mental state which Mr. Humanik had when he acted toward Lisa Guzzo is a question of fact for you to determine. Now, perhaps, knowledge, these are mental conditions which obviously you can't see, you can't grasp with any of the five physical senses. And they can be determined only by inference; that is to say, by what you find as a fact was done, what was said from the surrounding circumstances which you determine as a fact to have been present at the time.

The State is not obligated to produce a witness under oath to tell you that the defendant said that his purpose was to cause death or that he knowingly caused death or serious bodily injury, or that he knew what he was doing would kill Lisa Guzzo or was practically certain to kill her or were to cause her serious bodily injury from which she would die.

It is your obligation to determine if proof of purpose or of knowledge has been presented to you beyond a reasonable doubt by the testimony and by inference which could arise from the nature of the act and from all the surrounding circumstances at the moment of the incident.

Such things as where the persons were situated at the time of the incident, the weapon, the nature of the wound,

what preceded the incident which you might find as a fact had occurred, what was connected with it, what led up to it. All of these are some of the circumstances which you should consider.

So the essential determination for you ladies and gentlemen of the jury to make regarding the charge of murder is whether Mr. Humanik committed the killing purposely or committed it knowingly as I've defined those terms. It's the State's contention, of course, that he did just that. It is the defense contention that he did not.

So in order for you to find the defendant guilty of murder, the State must prove to your satisfaction beyond a reasonable doubt that the killing of Lisa Guzzo was committed by the defendant purposely or knowingly, either purposely or knowingly as I have defined those terms. (*Id.* at T126-16 to 129-13).

* * *

Now, the State doesn't have to prove a motive for the killing. If you're satisfied beyond a reasonable doubt that the State has proved the essential elements of the offense, the defendant must be found guilty regardless of motive or lack of motive. (*Id.* at T129-18 to 23).

* * *

Now, the defense contends that the defendant did not at the time the shot was fired act either purposely or knowingly as I have defined the terms. He contends that he was suffering from some mental disease or defect which prevented him from having such a state of mind, which is an essential element of the crime of murder as I've defined it.

In that connection there's been considerable testimony by psychiatrists and psychologists concerning which I've already given you guidelines for your consideration of such testimony.

In connection with the question of the defendant's mental state at the time in question, since the defendant has raised this defense, that is, the defense that he had a mental disease or defect at that time which prevented him from having the state of mind the law says he would have to have, that is, a knowing or purposeful mental state in connection with the killing, he has the burden to prove that he had such mental defect or disease by a preponderance of the evidence.

Now, that is not as great a burden as the law places on the State to prove his guilt beyond a reasonable doubt, because a preponderance of the evidence simply means the greater weight of the evidence. It doesn't mean that there has to be more testimony in connection with that or more witnesses in connection with that on behalf of the defendant than there was on behalf of the State. It has nothing to do with the amount of evidence or testimony. It is related only to the quality of the evidence or testimony, and it simply means that a preponderance of the evidence is the more believable evidence, the more credible evidence by not beyond a reasonable doubt, but just the great weight of it.

Therefore, if after considering all of the testimony and the evidence in this case in connection with the charge of murder you find that the defendant has failed to carry the burden of defense of mental disease or defect, and in addition, you find that the State has convinced you beyond a reasonable doubt that he either purposely or knowingly caused the death of Lisa Guzzo, your verdict should be guilty of murder.

On the other hand, if after considering all of the evidence and testimony you determine the State has failed to prove each and every element of the crime of murder and that the defendant has carried his burden of proving the defense of mental disease or defect at the moment the shot was fired by a preponderance of the evidence, then

you should find him not guilty of murder. (*Id.* at T130-23 to 133-4).

* * *

To review, your first duty is to determine whether or not the State has proved to your satisfaction beyond a reasonable doubt that the defendant killed Lisa Guzzo purposely or knowingly. If you are so satisfied, you will find the defendant guilty of murder as charged in the indictment and you will do nothing further. (*Id.* at T138-5 to 11).

Supreme Court, U.S.
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No. 88-1890

In The

# Supreme Court of the United States

October Term, 1988

HOWARD L. BEYER, Superintendent, and
PETER N. PERRETTI, JR., Attorney General
of New Jersey,

*Petitioners,*

v.

JOHN MICHAEL HUMANIK, JR.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the principle of due process articulated in *In re Winship*, 397 U.S. 358 (1970) and *Martin v. Ohio*, 480 U.S. 228, 233-34, *reh'g denied*, 481 U.S. 1024 (1987) that in a criminal case the State must prove each element of the charge beyond a reasonable doubt are violated in a State which recognizes the diminished capacity defense by a jury instruction that "since the defendant contends he suffered from a mental disease or defect which prevented him from having a state of mind which was an *essential element of the offense* . . . he has the burden to prove that he had such mental defect or disease by a preponderance of the evidence"?

2. Whether possible curative instructions, *not given in the instant case,* might save a statute (which requires that a defendant who asserts his innocence because of a mental condition which negates an element of the crime with which he is charged to prove such mental condition by a preponderance of the evidence) from violating due process, as suggested by the New Jersey Supreme Court *albeit* disputed by the Third Circuit Court of Appeals.

3. In a case where substantial evidence was presented that the defendant suffered from a mental disease or defect, where the expert opinions presented by the defense were that the defendant did not possess the requisite mental state at the time of the commission of the crime, *where the State's experts conceded that the defendant was abnormal* but opined that such condition did not prevent his formation of the requisite mental state, where such factual conflict was the only issue to be decided by

## QUESTIONS PRESENTED FOR REVIEW (Cont.)

the jury, and where a Federal Court has concluded that the State Court impermissibly gave the jury an unconstitutional understanding of their task, must that Federal Court discuss the law of "harmless error" before issuing a writ of *habeas corpus*?

4. Whether it is the prerogative of a State's judiciary, in attempting to sustain a conviction which violates the constitutional prohibition against *ex post facto* laws in the guise of statutory construction, to disregard the explicit instructions of that State's legislature and prior decisions of that Court?

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article I, Section 10

No state shall enter into any treaty, alliance, or confederation; grant Letters of Marque and Reprisal; coin money; emit Bills or Credit; make anything but gold or silver a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts, or grant any Title or Nobility.

United States Constitution, Amendment XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statute 2C:1-13
L.1978, c.95 (effective September 1, 1979)

a. No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

b. Subsection a. of this section does not:

(1) Require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or

(2) Apply to any defense which the code or another statute requires the defendant to prove by a preponderance of evidence or such other standard as specified in this code.

New Jersey Statutes 2C:4-2
L. 1978 (Effective September 1, 1979)

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to

prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

New Jersey Statutes 2C:4-2
(West 1982)

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.

New Jersey Statutes Annotated 2C:11-3(a)(1)
and (2)
L. 1978, c. 95 (effective Sept. 1, 1979)
amended L. 1979, c. 178 (effective Sept. 1, 1979).

Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death. . . .

New Jersey Statutes Annotated 2C:2-2b
(West 1982)

(1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

## COUNTERSTATEMENT OF THE CASE

Both the State and defense experts agreed that Respondent was abnormal, but they differed with regard to the exact diagnoses and whether it prevented Respondent from having the mental state required for conviction of a knowing and purposeful murder. *The State's* witnesses opined that Respondent had a personality disorder, in consequence of which he was inflexible in his approach to life and would characteristically act impulsively, (Transcript of April 1, 1982, T12 – 8; T13 – 3 to 6;

T15 – 20 to 25). They also felt that he was a paranoid personality who, when under stress, was likely to act with irrational and aggressive behavior accompanied with a diminished capacity to determine what was reasonable behavior or the implications of such behavior. (*Id.*, T113 – 7 to 18; T126 – 1 to 5; T129 – 5 to 8).

The defense experts were of the opinion that Respondent suffered from a borderline personality disorder nearing psychosis, (Transcript of March 29, T80 – 7 to 9; 142 – 6 to 12), with hairline-thin control over his actions, which were characteristically impulsive and unpredictable. (*Id.*, T47; T81 – 15). They further testified that this condition stemmed from the absence of love during Respondent's formative years. (*Id.*, T54 – 2 to 10).

Respondent had been abandoned by his mother while he was an infant, (*Id.*, T93 – 14 to 15), and then spent four years in foster homes before his aunt was able to arrange for him to live with her. (*Id.*, T97 – 4 to 5). His father played no significant role in his life. (*Id.*, T53 – 23 to 54 – 1).

In July of 1978, when Respondent was eighteen years of age, he met the deceased, (Transcript of March 30, 1982, T5 – 25 to 8 – 25), Lisa Guzzo, who was not yet thirteen. (*Id.*, 8 – 22 to 9 – 9). Despite the fact that males of that age do not usually have designs on girls six years younger then they are, (Transcript of March 29, 1982, T46 – 10 to 16), for Respondent it was "love at first sight". (Transcript of March 30, 1982, T6 – 8).

During that time Respondent also met the deceased's mother, (*Id.*, T5 – 25 to 6 – 35), whom he began to call "mom" almost immediately, and whom he continued to

refer to as "mom" even after the killing of her daughter. (Transcript of April 1, 1982, T134 – 1 to 136 – 10). Shortly after meeting the Guzzo family, and for the next three years, Respondent spent almost every weekend and most of his free time living with them. (Transcript of March 30, 1982, T10 – 20 to 13 – 18).

On August 5, 1981, Lisa Guzzo told Respondent that she no longer loved him and that she did not want to see him any more. (*Id.*, T22 – 12 to 13 – 2). The defense expert opinion was that to Respondent, her rejection constituted a loss of the way of life Respondent had started to envision, (Transcript of March 29, 1982, T155 – 20 to 23), and was extremely stressful to him, resulting in a loss of his concept of being and masculinity. (*Id.*, T148 – 8 to 11; 154 – 21 to 23).

For several days thereafter, Respondent did not sleep. Rather he dwelled on the situation and harbored thoughts of killing himself, the deceased, or her new boyfriend. (Transcript of March 30, 1982, T25 – 22 to 27 – 7; T50 – 3 to 17; T53 – 4 to 7; T63 – 15 to 17; T73 – 4 to 8).

On August 12, 1981, after hiding in the woods near the Guzzo home until "mom" and Mr. Guzzo left, (*Id.*, T88 – 20 to 89 – 4), Respondent created a distraction by lifting Lisa's puppy and using its paws to knock on the sliding glass window. When Lisa came out to put the puppy back in its pen, Respondent snuck into the house armed with a gun and a knife. (*Id.*, 92 – 11 to 93 – 13).

According to the *State's witnesses*, after telling the deceased, her sister Gina, and Stanley Emanuels, the deceased's new friend, to sit in the "rec room", Respondent put the knife away. (Transcript of March 23, 1982,

T26 – 2 to 21; 32 – 17 to 20). At some point, Lisa said that she was going to call her parents, causing Respondent to tear the telephone off the wall. (*Id.*, T30 – 13 to 32 – 14). Respondent soon put the gun in his waist band, but later took it out again. (*Id.*, T79 – 16 to 80 – 13). Thereafter, Respondent continually stated that he did not want to hurt anyone, (*Id.*, T85 – 8 to 10), and repeatedly looked out the front window whenever he heard something. (*Id.*, T37 – 8 to 23). While Respondent spoke to the deceased, the State's principal witness found what was happening on TV more interesting. (*Id.*, T29 – 13 to 30).

According to the *State's witness*, during the two and a half hours which followed his entry into the Guzzo home, Respondent talked about his feelings for the deceased, her family, his job and asked her whether she wanted some cheese cake. (*Id.*, T34 – 12 to 14; T87 – 23 to 24). Respondent also spoke with Stanley Emanuels about their respective schools and plans for the future. (*Id.*, T52 – 13 to 18).

Again, according to the State's witness, everyone discussed what TV program they should watch and ultimately agreed upon M.A.S.H. Respondent and the deceased then returned to "small talk". (*Id.*, T36 – 13 to 19). About the time M.A.S.H. was ending, a car arrived. (*Id.*, T68 – 8 to 13; T37 – 22 to 38 – 1).

Thereupon, Respondent went to the front window, and said: "This is where I make my exit". (*Id.*, T38 – 5 to 8). With gun in hand, Respondent ran to the sliding door, saying "Gina, I'd never hurt you", "Stan, we could have been friends." and "Lisa" (*Id.*, T96 – 12 to 16).

As Respondent said "Lisa," a shot was fired. (*Id.*, T99 – 2: T83 – 24). It was the opinion of the defense psychological experts that Respondent did not knowingly and purposefully commit the homicide. (Transcript of March 29, 1982, T58 – 1 to 7: T166 – 19).

A little less than two years before the killing, the New Jersey Legislature had enacted a complete revision of New Jersey's penal laws, now known as the Code of Criminal Justice. The Code became effective on September 1, 1979. Chapter 178, Section 148 of the Laws of 1979.

At the time of the homicide, The Code provided:

N.J.S. 2C:4-2

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

N.J.S. 2C:1-13 provides, with regard to "Code offenses," that a defense is an affirmative defense when it arises under a section of the Code *which so provides*. The State has the burden of disproving even affirmative defenses unless the Code or another statute place that burden on the defendant. Indeed, N.J.S. 2C:1-1(c)(1) provided that procedural provisions of the Code were to be applied to any pending pre-Code case unless confusion or delay would result.

In construing those statutes, the Appellate Division of the Superior Court of New Jersey had held that under the Code, in the absence of a provision to the contrary,

the State had the burden of disproving even affirmative defenses. *State v. Galiyano*, 178 N.J.Super. 393, 397 (App. Div., 1981).

Effective *the month following* the homicide, N.J.S. 2C:4-2 was amended to provide that:

> Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.

Over Respondent's objections at trial that to charge in conformity with the amendment to the diminished capacity statute would violate both the prohibition against *ex post facto* laws and federal due process standards which require the State to prove every element of the offense charge beyond a reasonable doubt, the trial court charged the Jury as follows:

> Now, it's obvious and we're all familiar with the fact that a pistol is capable of producing death or serious bodily injury leading to death, and therefore, in your deliberations, you may consider the weapon used, the manner and circumstances of the victim's death, and since there is no question that Mr. Humanik, with weapon in his hands, shot and killed the victim, *you may infer from that fact* and from the manner of the circumstances of the killing *what the defendant's purpose or knowledge was* at the instant or what it was not.
>
> Now, the defense contends that the defendant did not at the time the shot was fired act either purposely or knowingly as I have defined the terms. He contends that he was suffering from some mental disease or defect *which prevented him from having a state of mind, which is an essential element of the crime of murder as I've defined it* . . .

> In connection with the *question of the defendant's mental state* at the time in question, since the defendant has raised the defense, that is, the defense that he had a *mental disease or defect* at the time *which prevented him from having a state of mind the law says he would have to have,* that is a knowing or purposeful mental state in connection with the killing, *he has the burden to prove that he had such mental defect or disease by a preponderance of the evidence.* (Transcript of April 1, 1982, T130 – 11 to 131 – 20)

The United States Constitution requires the prosecution in every criminal case to prove each and every fact necessary to constitute the crime charged beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970); *Mullaney v. Wilbur,* 421 U.S. 684 (1975). Moreover, in *Sandstrom v. Montana,* 442 U.S. 510, 61 L Ed2d 39 at 45 (1979), this Court held that it is a violation of Due Process to instruct the jury that they can infer from the very doing of the act the necessary mental element prohibited by the offense charged.

In *Sandstrom,* this Court noted that careful attention must be given to what was actually charged since the question ultimately turns upon the way in which a reasonable jury could have interpreted the jury instruction. This Court held that the constitutionality of jury instructions must be considered *vel non.* Thus, we were instructed that a trial court may not constitutionally withdraw an issue from jury consideration by an instruction that the law raises a presumption of intent from an act since such would effectively eliminate the necessity of the State to prove intent as an element of the offense, thereby conflicting with the overriding presumption of innocence.

Moreover, Article 1, Section 10 of the United States Constitution provides that "No State shall . . . pass any *ex post facto Law* . . . " This Court has held that the prohibition is violated where the new law alters the situation to the disadvantage of the accused, *Duncan v. Missouri*, 152 U.S. 377 (1894); or lessens the degree, amount, or measure of proof which is necessary for the state to convict, *Hopt v. Utah*, 110 U.S. 574 (1884); or makes a change which impairs his defense even if the change is designated as "procedural." *Kring v. Missouri*, 107 U.S. 221, 27 L.Ed. 506 (1883).

The fact that the foregoing Federal Constitutional Provisions had been violated in his case was brought to the attention of the Trial Court and the Superior Court of New Jersey, Appellate Division, by Respondent. But his arguments were *ignored*. Rather than squarely face the issue and attempt to establish a reasonable basis for concluding that the *ex post facto* issue was not controlled by the Legislature's express declaration that in the absence of a statute the burden was on the State to disprove even affirmative defenses, *N.J.S. 2C*:1-13, or that prior case law was in error in so holding, the Appellate Division declined to address the Legislation and its prior pronouncement. Rather, the Court predicted its discussion by analogizing the case before it to one having to do with a *Non-Code* defense.

Similarly, the Appellate Division chose not to discuss the Due Process issues Respondent raised in the *light of the charge actually given*. Rather, the Court suggested that the Legislature could constitutionally require the defense to rebut the presumption of mental normalcy as long as

the prosecution bore the burden of establishing the requisite state of criminal culpability beyond a reasonable doubt.

The New Jersey Supreme Court chose not to consider Respondent's petition for Certification. However, by the time Respondent petitioned the United States District Court for the issuance of a writ of *habeas corpus*, the New Jersey Supreme Court had rendered its decision in *State v. Breakiron*, 108 N.J. 591 (1987), wherein the interplay between New Jersey's statutory law governing culpability and its statutory law governing diminished capacity were discussed.

In *Breakiron*, the defendant had entered the defense of insanity and presented substantial evidence as to his mental state at the time of the commission of the homicide for which he was charged. As in the instant case, the fact of the homicide was conceded and the sole factual contentions in defense centered upon the defendant's mental state. The trial court in *Breakiron* allowed such evidence to go before the jury upon this issue of insanity but refused to charge the jury as to what effect such evidence might have upon the issues of culpability: *i.e.* the "diminished capacity" defense. In upholding the conviction on appeal, the Appellate Division held that it was for the Trial Court to determine as a "matter of law" whether the defendant had established by a preponderance of the evidence that a mental condition existed which had resulted in an act that was lacking in either the knowledge or purpose required by the Code for conviction. The New Jersey Supreme Court reversed.

In *Breakiron*, the New Jersey Supreme Court traced the history of the *laws* regarding mental illness or deficiency, and their roles in the criminal justice system. The Court recognized that there were THREE species of the defense of "diminished capacity".

Those three species may be identified as: avoidance; mitigation; and negation. Although it did not use the term "avoidance", the Supreme Court recognized that, essentially, the classic defense of insanity which has been carried into current law under the Code is one of "avoidance": the defendant does not dispute either that the prohibited act was done, nor that it was done with the prohibited intent, but seeks to avoid punishment by reason of other facts, i.e., that he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, he did not know what he was doing was wrong. (the classic *M'Naghten* rule). In reversing *Breakiron*, the Supreme Court recognized that "diminished capacity" under N.J.S. 2C:4-2 is not a subset of the defense of insanity and thus, not a defense of avoidance.

The second species of the "defenses" of diminished capacity is that of "mitigation". The *Breakiron* court discussed that species in the context of *Patterson v. New York*, 432 U.S. 684 (1975), noting that under New York law, although it was the State's burden to prove all elements of the offense beyond a reasonable doubt, the United States Supreme Court had held that it was not a denial of due process to require that a defendant bear the burden of proving that the crime was committed under "extreme emotional disturbance" in order to mitigate or reduce the penalty to that for a "lesser crime". The *Breakiron* Court

noted that under New Jersey's capital sentencing structure, N.J.S. 2C:11-3, diminished capacity could have such a "mitigating" effect. It held, however, that *diminished capacity is NOT a mitigation defense in the guilt phase of a trial.*

The conclusion of the *Breakiron* Court was that the function of N.J.S. 2C:4-2 was to "negate" an essential element of the offense with which the defendant was charged.

On two occasions since *Mullaney,* this Court has allowed convictions to stand despite the fact that some burden was placed upon the defendant. Those occasions were *Patterson, supra.,* and *Martin v. Ohio,* 480 U.S. 228, 94 L Ed2d 267, 107 S.Ct. 1098 (1987). *Patterson,* as aforesaid, was a case where the defendant was permitted to mitigate the crime by reason of his extreme emotional disturbance. *Martin* was a homicide where the defendant claimed that she had acted in self-defense, but where, under Ohio law the burden of proving self-defense by a preponderance of the evidence was cast upon the defendant.

Although the *Breakiron* Court mentioned *Martin* in the context of its discussion of "mitigation", this Court's analysis there more properly falls within the sphere of "avoidance". The *Martin* Court noted that such defense under Ohio law neither disputes the act itself, nor that it was done with intent to injure another. Rather, the defense sought to avoid penal sanctions by interposing other facts which justified such use of force. Indeed, the *Martin* Court also pointed out that while it was not a denial of due process for a State to impose the burden of

proof as to justification upon a defendant, it was the obligation of the trial court to assure that the jury was instructed that the evidence presented upon the "self-defense" issue also bore upon the elements of the offense charged, and that such evidence could be considered in the context of "reasonable doubt", upon which the State had the burden of proof.

No decision by this Court has permitted the State to shift the burden of proof to a defendant upon any fact which would establish or negate an element of an offense. The *Breakiron* Court attempted to sustain the constitutional validity of N.J.S. 2C:4-2 through a sleight of hand. It suggested that N.J.S. 2C:4-2 does nothing more than present a presumption as to facts not in issue – the defendant's mental capacity – unless raised by the defendant and, if so raised, that N.J.S. 2C:4-2 still remains permissible to cast the burden of proof "as to his mental condition" upon the defendant since his mental condition is not an element of the offense.

Although the Honorable Freda L. Wolfson, United States Magistrate, concluded that the State Court had not properly decided Respondent's claim of *ex post facto* law violation, the Honorable Garrett E. Brown, Jr., United States District Court Judge, ruled that no such violation had occurred since N.J.S. 2C:4-2 did not impermissibly shift the burden of proof as to an element of the offense to the defendant. Judge Brown further held that since the "record establishes guilt beyond a reasonable doubt" any violation of the *ex post facto* prohibition was harmless.

The Third Circuit Court of Appeals concluded that *because* "State courts are the ultimate expositors of state law . . . we are bound by their constructions except in rare

instances." Thus, the Court did not address the claim that the imposition of the burden of proof upon the Respondent violated the prohibition against *ex post facto* laws. The Third Circuit did conclude, however, that the charge in the instant case did not meet the requirement expressed by the New Jersey Supreme Court in *Breakiron* or *State v. Zola*, 112 N.J. 384, 548 A.2d 1022 (1988), not to mention those expressed by this Court in *Martin*. It additionally found that the Court's instruction, when taken as a whole, did not cure the defective instruction since nothing in the charge diluted the express improper instruction. It further held that general statements respecting the State's burden of proving each element of the offense beyond a reasonable doubt did not cure the problem since the charge, taken as a whole, created a reasonable likelihood that the jury received an unconstitutional understanding of their task. Finally, the Court of Appeals concluded that not even the giving of instructions as recommended by the New Jersey Supreme Court in Zola could save N.J.S. 2C:4-2 from being unconstitutional because, so construed, the State would be permitted to impose a "preponderance of the evidence filter" which may bar consideration of evidence tending to raise a reasonable doubt as to an element of the offense.

## ARGUMENT

### THE WRIT SHOULD BE DENIED BECAUSE THIS COURT SHOULD NOT PERMIT SEMANTIC OBFUSCATION TO FURTHER DELAY THE TERMINATION OF AN UNLAWFUL INCARCERATION

This should not have been a difficult case. There was nothing clearer than New Jersey's Legislative directive,

existent both at the time of the homicide and at the time of the trial, that it was the State's burden to disprove even affirmative defenses unless the Code or another statute otherwise provided. N.J.S. 2C:1-13 a and b(2). But, by the time of the trial, the Legislature had amended N.J.S. 2C:4-2 to cast the burden of proving a mental disease or defect upon the defendant. Then, by the use of the term "procedure," the trial court altered the rules of the game. That the improper use of "procedure" to violate a defendant's rights was curtailed by pronouncements of this Court, *Krieg, supra., Duncan, supra.*, was of no moment to the trial court.

It is significant that in dealing with this issue, the State has chosen the road of avoidance. On the Appellate level, the Court chose not to discuss how, in the interpretation of legislation, one can disregard the plainly expressed directive of the Legislature. No attempt was even made to transform the meaning of what the Legislature said by "construction" or some other hallowed method of manipulating words. It was simply ignored.

While it may be true that State Courts are generally the ultimate expositors of its own laws, it is respectfully submitted that one of the exceptions to that rule must be when a State elects to disregard the "facts" of its own prior legislative acts and pronouncements. Were this not the case, then the prohibition against *ex post facto* laws would be rendered nugatory. A similar semantic problem surrounds the issue of whether, despite clear pronouncements by this Court that Due Process of Law requires that the State must bear the burden of proving beyond a reasonable doubt every fact necessary to convict, *Winship, supra.*, a State may constitutionally instruct a jury that the

defendant has the burden of proving a mental disease or defect which would prevent him from having a state of mind which is an essential element of the crime. The District Court, *albeit* in another case, *Wilson v. Tard*, 593 F. Supp. 1091 (*D. N.J.*, 1984), saw the element of the offense and the claim of the defense as being mirror images of each other. The Court of Appeals in the instant case, while recognizing that there was a distinction, determined that in the absence of clear instructions, not given in the instant case, a jury would not be able to draw upon it. This is so because what we have here is a distinction without a difference.

The issue is more clearly placed in context when it is recalled that a mental disease or defect *which did not bear* upon a requisite element of the charge would be *irrelevant* and not presented to the jury under New Jersey Law. While it is true that in some instances a defendant may be suffering from some mental defect *irrelevant* to the formation of the purpose or knowledge required by the offense charged, once that relevence is established, such condition can not be judicially separated from the operative facts of the case and the State's burden to prove purpose or knowledge.

That Courts may express some doubts as to the wisdom of recognizing any defense predicated upon so elusive a fact as the condition of someone's mind should not serve as justification for permitting their analysis to become clouded. Whether "diminished capacity" should or should not be a defense is just as exclusively a matter of that State Legislature's concern as is the designation of the crime itself.

Given that, the situation is clearly analogous to the "alibi" defense. While there are crimes which may be committed by an absent defendant, where the State, *in order to prove that the defendant committed the crime,* must prove that the defendant was *present,* and the defendant presents evidence that he was elsewhere, *identity* becomes an element which the State must prove beyond a reasonable doubt. In such a case, it is frivolous to suggest that, unless put in issue, identity is not an element of the offense and, therefore, the State can impose upon the defendant the burden of proving that it was not he who committed the offense.

It has been said that the primary role of government is to protect its citizens. To do so, we must remain a society governed by laws.

The actual legal issue raised by this case, the constitutionality of the trial court's instructions *vel non,* was resolved by this Court in *Martin,* which case was properly applied by the Court of Appeals in rendering its judgment herein.

That these may be some way to construe N.J.S. 2C:4-2 so that some jury instructions could avoid violating the Due Process Clause is an issue best left for another case and another day. This is not such a case. Indeed, this is not even a case which can withstand scrutiny under New Jersey's pronouncements in *Breakiron* and *Zola.*

Lastly, the Petitioner's claim that this Court should grant the Writ to consider the Court of Appeals decision in the light of *Rose v. Clark,* 478 U.S. 570 (1986) and *Burger v. Kemp,* 483 U.S. 776 (1987) might have more merit had *Rose* been properly understood by petitioner.

In *Rose*, this Court was concerned with whether a charge unconstitutionally shifting the burden of proof in violation of *Sandstrom* could be harmless error. The Court of Appeals had reasoned that solely because malice had been factually contested, the burden shifting instruction could not be harmless. This Court held that it could be harmless when, *on the record as a whole, the error is harmless beyond a reasonable doubt . . . The inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.*

The *Burger* Court was able to do so on the evidence before it. There defendant and his co-indictee had kidnapped Roger Honeycutt at knife point, robbed and sodomized him, blindfolded and tied his hands, and placed him in the trunk of the vehicle they had stolen from him. They then drove him to a lake, opened the trunk, asked him if he was all right, received his assurances that he was, closed the trunk, started the car, put it in gear, and watched it ride into the lake, where Honeycutt drowned.

In the instant case, Respondent, the deceased, and two others discussed what television programs to watch and for most of two and a half hours engaged in small talk. There was not only clearly conflicting expert evidence, but, *perhaps more importantly*, a solid basis of facts from which the experts could draw their differing conclusions.

This case is neither *Burger*, nor *Zola*, nor *Breakiron*. This is simply a case where unconstitutional instructions were, without any ameliatory additions, given over

Respondent's timely and pertinent objection, to his detriment.

## CONCLUSION

In view of the foregoing, it is respectfully submitted that this Court should deny the petition for the issuance of a writ of certiorari.

Respectfully submitted,

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DATED: June 23, 1989